

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

465
F 530

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,362

CONTINENTAL OIL COMPANY,
Appellant,

v.

STEWART L. UDALL,
Secretary of the Interior,

and

PHILLIPS PETROLEUM COMPANY
and
AZTEC OIL & GAS CO.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 10 1966

Nathan J. Paulson
CLERK

Two witnesses to
execution by lessee:

/s/ W. M. Reed
Denver, Colorado

/s/ John E. Norman
Denver, Colorado

CONTINENTAL OIL COM-
PANY

By /s/ J. W. Liddell
Vice President

Attest: /s/ C. C. Riley
Assistant Secretary

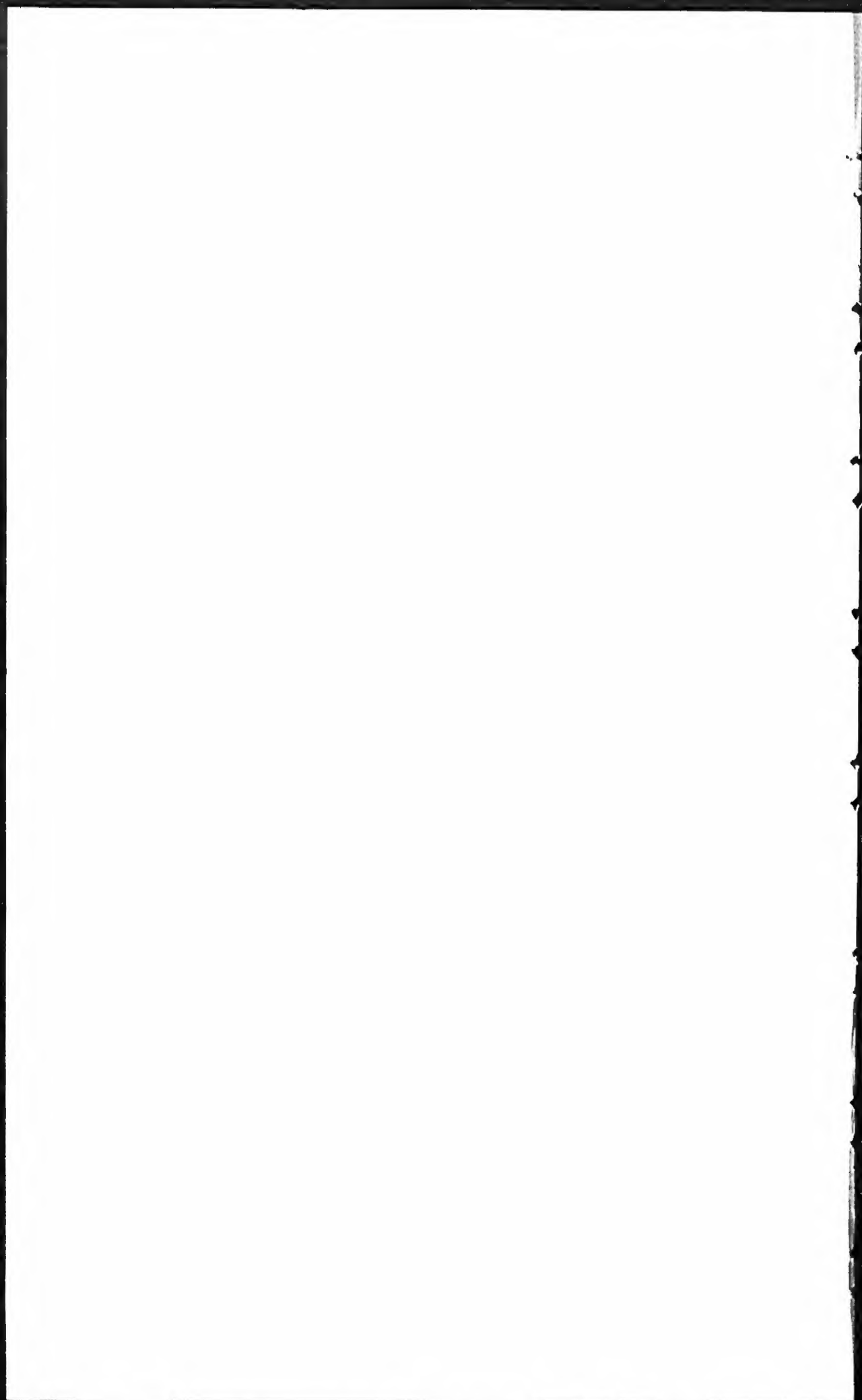
[Acknowledgment of Lessor - Dated July 19, 1951]

[Excerpt from Advertisement No. 41]

BLOCK B

SAN JUAN COUNTY, UTAH
(Surveyed and Unsurveyed)

Point of origin to which most of the unsurveyed portion of the following tracts are referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.



boundary on the west side of Sec. 7, T. 32 N., Range 13 W., N.M.P.M., Colorado; THENCE West one (1) mile along the Colorado-New Mexico state line; THENCE North approximately one and three quarter ($1\frac{3}{4}$) miles; THENCE East two and one-half ($2\frac{1}{2}$) miles to the West boundary of existing Ute Mountain Oil and Gas Lease Contract No. I-22-Ind. 2760; THENCE South one-quarter ($\frac{1}{4}$) mile; THENCE West one-half ($\frac{1}{2}$) mile; THENCE South one (1) mile; THENCE West one (1) mile; THENCE South one-half ($\frac{1}{2}$) mile to point of beginning, the east boundary of this tract to coincide with the west boundary of said existing lease I-22-Ind. 2760, Comprising approximately 2,000 acres, more or less.

containing 2,000 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

* * *

14. A well must be completed on the leased land within the five years after the date of approval of the lease to test thoroughly the Pennsylvanian formation unless at a lessor depth oil or gas is discovered which can be produced in paying quantities or the lessee shall at any time establish to the satisfaction of the Oil and Gas Supervisor, U. S. Geological Survey, Roswell, New Mexico, that further drilling of said well would not be warranted or practicable, provided, however, that the lessee shall not in any event be required to drill in excess of 9,500 feet. In the absence of the completion of such test well within the time allowed, the lease shall be subject to cancellation.

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F 530

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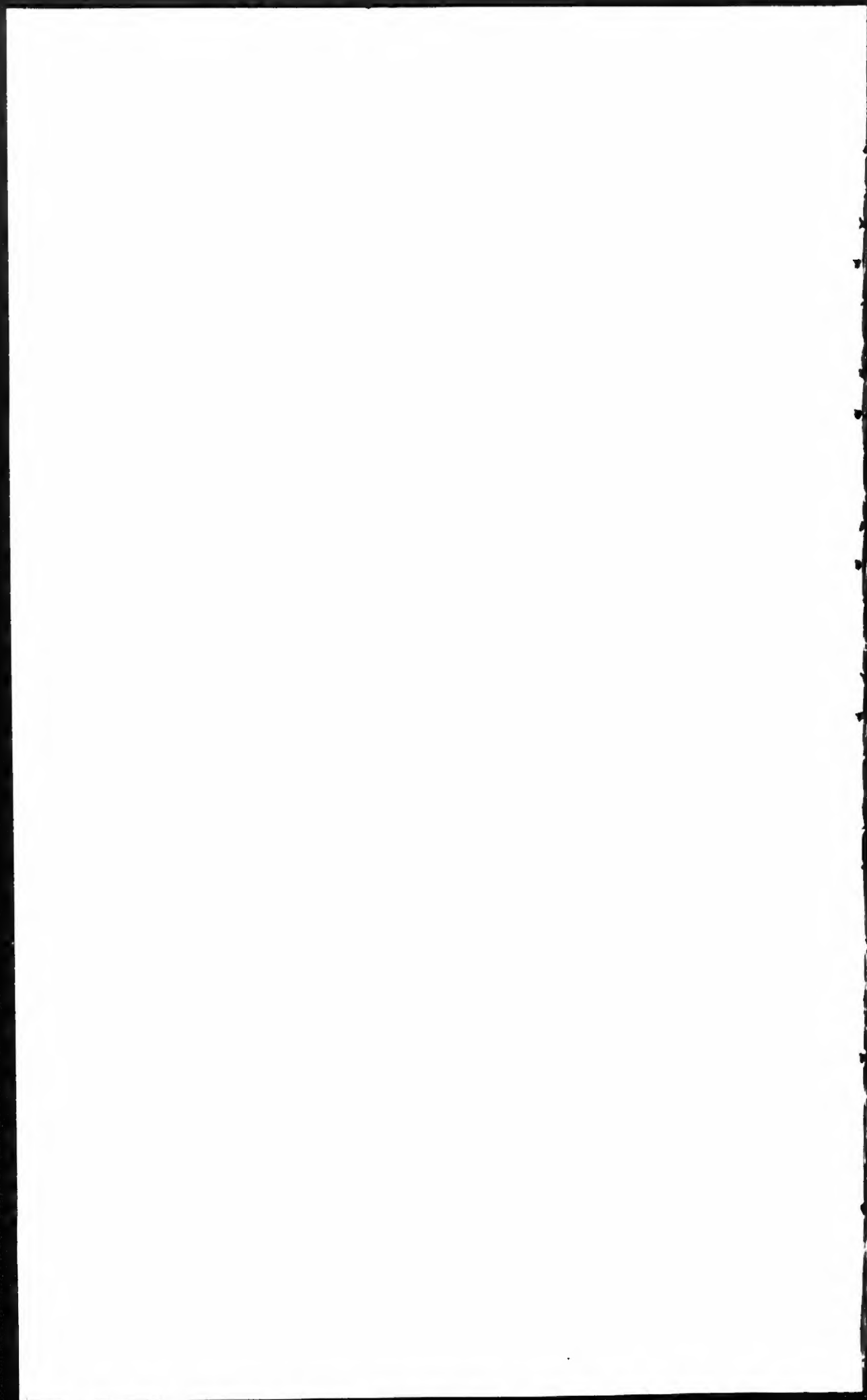


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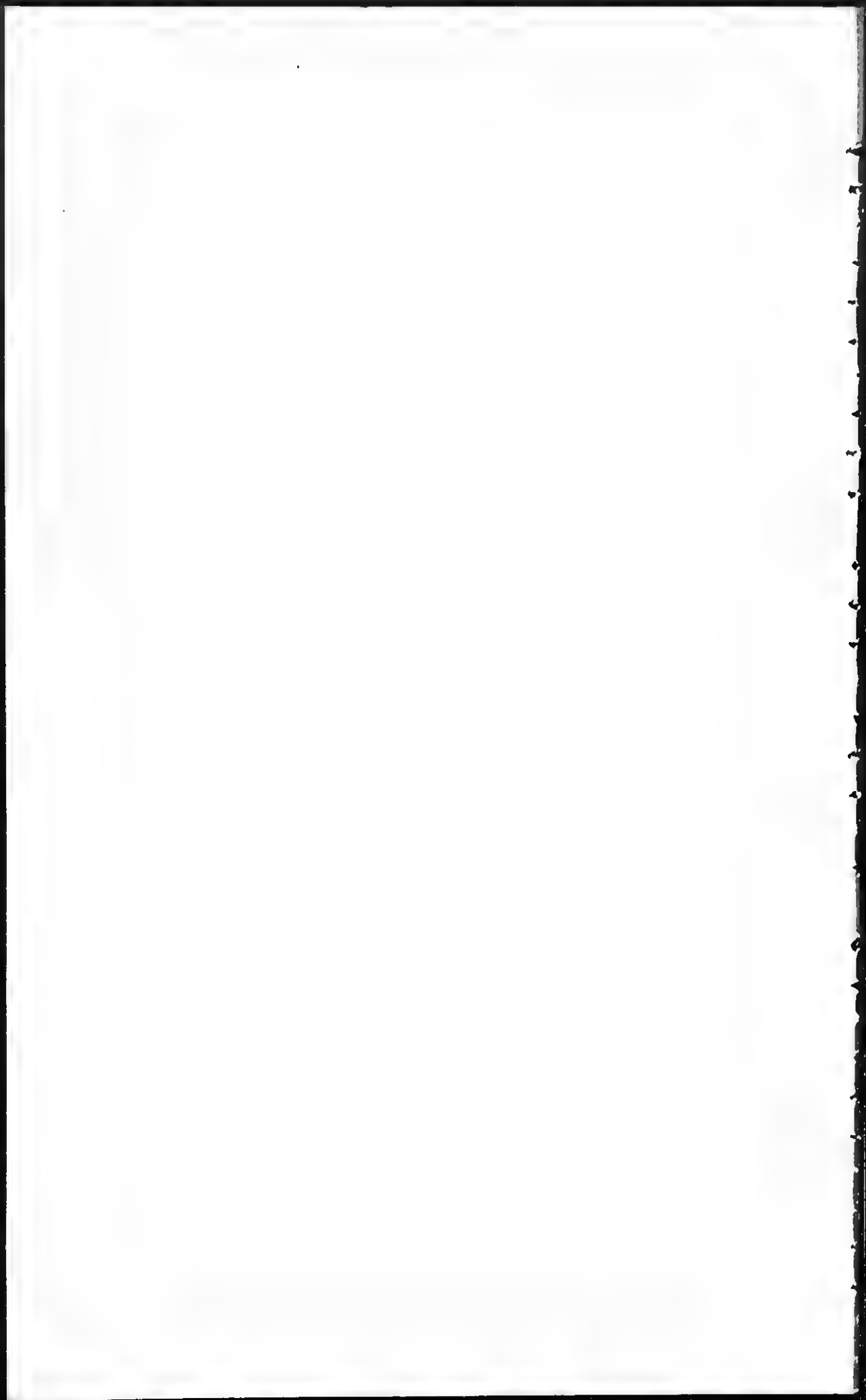
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONTINENTAL OIL COMPANY,
Plaintiff,

v.

STEWART L. UDALL,
Secretary of the Interior,
Defendant,

PHILLIPS PETROLEUM COM-
PANY and
AZTEC OIL & GAS CO.,
Intervenors.

Civil Action
No. 366-62

RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
<u>1962</u>	
Feb. 1	Complaint appearance, Exhibits A, B, C & D, filed.
May 16	Answer of defendant to complaint; C/M 5-15-62; appearance of Ralph S. Boyd, filed.
June 22	Order granting leave to Phillips Petroleum Company and Aztec Oil & Gas Co. to intervene as parties defendant.
June 25	Answer of intervenors to complaint; appearance of Hugh B. Cox and Henry P. Sailer, filed.
<u>1965</u>	
Jan. 13	Stipulation of counsel re: administrative record; exhibits A, A-1, B-1, C-1, D-1 and 2 thru 21 inclusive, filed.
Jan. 14	Motion of plaintiff to amend administrative record; P & A C/M 1-14-65; MC 1-14-65, filed.

JA 2

Mar. 17	Order continuing motion to amend administrative record for hearing before trial Judge or judge hearing motion for summary judgment.
Apr. 28	Exhibits 22, 23(a) and 23(b) of defendant to stipulation filed January 13, 1965, filed.
<u>1966</u>	
Apr. 29	Finding of Fact and Conclusions of Law.
Apr. 29	Judgment that the plaintiff take nothing and this action be dismissed on the merits.
June 24	Notice of appeal by plaintiff, filed.

[Filed Feb. 1, 1962]

**COMPLAINT FOR REVIEW, FOR
DECLARATORY JUDGMENT AND
FOR OTHER RELIEF**

Comes now CONTINENTAL OIL COMPANY, a Delaware corporation, and for its complaint against the defendant named above, alleges and represents as follows:

1. The jurisdiction of this Court is invoked (1) under Title II, Section 306 of the District of Columbia Code upon the grounds that the defendant's official residence is the District of Columbia and upon the additional ground that the construction and interpretation of Federal Statutes and Regulations are required, and (2) under Section 10 of the Administrative Procedure Act (5 U.S.C. 1009). The value of the property involved, exclusive of interest and costs, exceeds \$10,000.00.

2. Plaintiff seeks a review of a decision of the defendant under the terms of the Administrative Procedure Act, a declaratory judgment under the terms of the Declaratory Judgment Act (28 U.S.C. 2201, 2202) and other relief. This case involves a determination of a question of actual controversy between the parties hereto, which controversy may be determined by a judgment of this court. All administrative remedies available to plaintiff have heretofore been exhausted.

3. Plaintiff is the lessee and owner of two oil and gas leases granted to plaintiff by the Navajo Indian Tribe and approved by the Department of the Interior. These leases bear Contract Nos. 14-20-603-407 and 14-20-603-409, respectively, and cover certain lands in San Juan County, Utah. This case is concerned with the unlawful, unreasonable and arbitrary action of the defendant in denying that such leases include within their boundaries a strip of land about four miles in length and 624 feet in width, containing approximately

300 acres. This strip of land is sometimes, for convenience, referred to herein as "said 300 acre strip". An illustrative plat is attached and marked Exhibit "A".

4. The Secretary of the Interior, acting through his officers and agents, by Advertisement No. 41 dated March 24, 1953, advertised for sealed bids for oil and gas leases on various separately identified and numbered tracts of land in the Navajo Indian Reservation situate in San Juan County, Utah, and Apache County, Arizona. This was done pursuant to the authority of the Secretary under the Act of May 11, 1938 (25 U.S.C., 396a, 396b) (52 Stat. 347). Of the lands covered by this advertisement, part were officially surveyed lands and part were unsurveyed lands. Each tract covering unsurveyed lands was described in the advertisement by metes and bounds. Bids were invited on each tract separately. This Advertisement No. 41 is a voluminous document containing 67 pages, many of which are immaterial to this controversy so that it would not be appropriate to attach to this complaint a complete copy of this advertisement, but there are attached and made a part hereof and marked Exhibit "B", a number of pages contained in Advertisement No. 41 which show everything in the advertisement material to this controversy and illustrate the manner in which various tracts were described and shown in the advertisement. These pages are 1, 2, 3, 12, 19, 20, 21, 23 and 54.

5. At the time Advertisement No. 41 was published and posted and at all times thereafter material in this case, the regulations of the Department of the Interior relating to the leasing of Navajo Indian Tribal Lands (25 C.F.R. Part 171), did not contain any regulation dealing specifically with the manner of leasing unsurveyed tribal lands. The Department's regulations for leasing of public lands did however, contain a regulation with respect to leasing of unsurveyed public lands (43 C.F.R. 192.42(a)(4)). This regulation provided that unsurveyed

public lands shall be leased by metes and bounds descriptions. Pursuant to this regulation it has for many years before and after the publication of Advertisement No. 41, been the practice of the Department to lease unsurveyed public lands by metes and bounds. In numerous decisions the Secretary has held that the boundaries of leases of unsurveyed public lands are controlled and determined by the metes and bounds description regardless of whether or not such boundaries so determined coincide with the section lines of official surveys later made and regardless of the inclusion of language in such leases to the effect that the leased lands would probably when surveyed comprise certain designated sections of lands.

6. Within the time provided for in Advertisement No. 41, plaintiff duly submitted sealed bids, which for the tracts here involved were to be opened May 1, 1953, and was the successful bidder for unsurveyed tracts identified and numbered in said Advertisement as 88 and 97.

7. Under date of October 13, 1953, the plaintiff, as leasee, and the Navajo Tribe of Indians, as lessor, entered upon two separate oil and gas leases, one for Tract 88 and one for Tract 97 of Advertisement No. 41. Each of these oil and gas leases was approved by the Department of the Interior under date of December 10, 1953. In each lease the lands were described by metes and bounds exactly the same as they had been described in Advertisement No. 41. Each lease stated that the lands covered by the lease contained approximately 2,560 acres, and under the provisions of Advertisement No. 41, the plaintiff was called upon to pay at or about the time of the acceptance of plaintiff's bid, the first year's rental for the lease computed on an acreage basis at the rate of \$1.25 per acre, and plaintiff did within the time and in the manner prescribed make payment in the amount of \$3,200.00 with respect to each lease for such first year's rental, the amount paid representing the rental computed on the basis of each lease containing 2,560 acres. Thereafter plaintiff has from year to year

duly made payment of rentals under each such lease in the same amount and such payments have been accepted without reservation by the Tribal Council of the Navajo Tribe of Indians with the approval of the Department of the Interior. A copy of each of these leases is attached hereto as Exhibit "C".

8. In response to the invitation for bids in Advertisement No. 41, one F. D. Jernigan, who had also submitted sealed bids for various tracts, was successful in his bids for unsurveyed Tracts 87 and 96. Under date of October 27, 1953, he entered upon oil and gas leases bearing Contract Nos. 14-20-603-353 and 14-20-603-355 with the Navajo Tribe of Indians. These leases were approved by the Department of the Interior January 8, 1954. The lands covered by these tracts were also described in Advertisement No. 41 and in the leases by metes and bounds and the south boundary of these leases as described by metes and bounds coincided exactly with the north boundary of plaintiff's leases here involved. By mesne conveyances each of these leases has in the course of time come to be owned by Aztec Oil & Gas Company and Phillips Petroleum Company in the proportions of one-half each.

9. Under date of May 10, 1954, long after plaintiff had acquired its leases 14-20-603-407 and 14-20-603-409 here involved and long after such leases were approved by the Department of the Interior, the Surveyor General of the Department of the Interior approved an official survey of all or practically all of the unsurveyed lands in San Juan County, Utah, covered by Advertisement No. 41. In this survey, only the external township boundaries were surveyed with section and quarter section corners marked along such external boundaries. The interior section lines and corners were not officially surveyed. The lands here in question are located within Township 41 South, Range 24 East of such Official Survey.

10. Sometime in the latter part of 1956, plaintiff undertook to establish, by private survey, the internal section lines and section corners of Sections 27, 28, 33 and 34, and Sections 29, 30, 31 and 32, Township 41 South, Range 24 East. These sections comprise part of the lands covered by plaintiff's leases. Plats of such surveys were prepared and filed with the Area Director of the Bureau of Indian Affairs, Window Rock, Arizona, and with the Supervisor, United States Geological Survey in Roswell, New Mexico, the plat of Sections 27, 28, 33 and 34 being filed on or about December 14, 1956, and the plat of Sections 29, 30, 31 and 32 being filed on or about January 15, 1957. This was done for the purpose of establishing the internal section corner markers in the area of the plaintiff's leases in contemplation of possible development and in the light of the requirements of the Utah State Conservation Laws and Regulations which require orderly well spacing and development of oil and gas based upon section and subsection boundaries. Each of the plate also purported to be a survey pursuant to a lease provision calling for the lessee to survey the leased premises prior to drilling, but plaintiff later discovered that the plats so filed were not, in fact, in strict compliance with this provision although they were sufficient for the purposes of the then contemplated drilling operations.

11. At about the same time the private surveys mentioned in paragraph 10 were being made and filed, plaintiff, in the interest of development in this area, negotiated and entered upon a Farmout Agreement with Davis Oil Company under the terms of which plaintiff assigned to Davis Oil Company its leasehold interest in four regular 80 acre subdivisions included within said Section 27, as privately surveyed, said Section 27 being one of the sections covered by plaintiff's Lease No. 14-20-603-409, and Davis agreed to drill a test well for oil and gas on one of such 80 acre tracts. This well was located in the NE 1/4 NE 1/4 of said Section 27 as privately surveyed. Pursuant to this agreement Davis Oil Company drilled for

oil and gas and discovered oil, such discovery comprising the initial discovery in what is now the White Mesa Field of the Greater Aneth Area and represented a major new discovery of oil.

12. Shortly after the discovery in the Davis well and on or about June 19, 1957, Phillips Petroleum Company commenced to drill, in Section 22 (as privately surveyed) of Township 41 South, Range 24 East, a well for oil and gas offsetting the Davis well. The usual location for such well under the 80 acre spacing which prevailed in the Aneth Area would have been 660 feet from the south boundary of said Section 22 and if so located, such well would have been within the boundaries of Contract No. 14-20-603-355 with respect to which Jernigan was the successful bidder and which later came to be owned by Phillips-Aztec as above related. However, in order to locate the well as near as possible to the Davis well, Phillips moved the location of the well as far to the south as permitted by the regulations of the Utah Oil and Gas Conservation Commission, to-wit: only 510 feet north of the south boundary of said Section 22. As so located the well was on plaintiff's Lease No. 14-20-603-409. That the well was so located was not, however, known to plaintiff at the time drilling of the well was commenced nor until several weeks thereafter, but Phillips Petroleum Company knew or should have known that such was the case for the reasons elaborated upon in the next paragraph of this complaint.

13. Prior to the commencement of the well by Phillips Petroleum Company referred to in paragraph 12 above, a number of lessees owning leases in the White Mesa Area and in one or two other areas covered by the official survey referred to in paragraph 9 above became aware of the fact that the boundaries described in some of the leases by metes and bounds did not coincide with the section lines established or indicated by the Bureau of Land Management township boundary survey. Representatives of some of these lessees, including Phil-

lips Petroleum Company, attended a meeting on or about April 11, 1957, at which this matter was discussed. Although no representative of plaintiff attended this meeting, a report of the proceedings was later circulated which showed that those attending recommended that an effort should be made to have all lease owners agree that the lease boundaries be adjusted to coincide with the section lines as established or indicated by the Official Survey, but it was recognized that individual lessees might have problems with respect to particular lease boundaries and that such matters would have to be left to private negotiation by those concerned. At the time Phillips commenced the above referred to well, an agreement providing for the adjustment of lease boundaries to coincide with section lines as established or indicated in the Official Survey had been prepared and was being circulated among the leasehold owners in the area. This proposed agreement was submitted to plaintiff for its consideration sometime in May of 1957. Upon receipt of this proposed agreement, plaintiff commenced a study thereof and a review of its leases in this area including plaintiff's leases here involved. A comparison of the official Bureau of Land Management township boundary survey and the metes and bounds descriptions in the plaintiff's leases showed that the north boundaries of these two leases did not coincide with the section boundaries and that the proposed adjustment would result in plaintiff being deprived of a very considerable area of valuable leasehold lands, the exact extent of which could not be determined without further surveying. Plaintiff thereupon decided not to execute the proposed agreement and did not and never has done so. Thereafter, in order to determine the exact location of the north boundary of its leases and in order to be sure that it was in strict compliance with the lease provisions requiring a survey of the leased premises prior to drilling, plaintiff understood a survey of the leases here involved. This survey was completed in August of 1957 and appropriate plats filed with the Area Director, Window Rock, Arizona, and

with the Supervisor, United States Geological Survey, Roswell, New Mexico, on or about August 14, 1957. At the same time plaintiff notified Phillips Petroleum Company that the Phillips well referred to in paragraph 12 above was located on plaintiff's lease.

14. On or about May 9, 1958, plaintiff filed a notice of intention to drill a well identified as Continental Navajo B-9 Well to be located on said 300 acre strip in the W1/2SW1/4 of Section 20 as privately surveyed. By letter dated July 10, 1958, permission to drill this well was denied by the Supervisor, United States Geological Survey, upon the ground that the location of such well would be upon lands not covered by plaintiff's Lease No. 14-20-603-407. While plaintiff's application for approval to drill the Continental Navajo B-9 Well was pending, plaintiff received information that Phillips Petroleum Company had filed a notice of intention to drill Phillips No. 10-A Desert Well to be located in the said W1/2SW1/4 of Section 20 (privately surveyed), and the plaintiff promptly filed a protest. Notwithstanding this protest, the Supervisor by letter dated July 3, 1958, approved the Phillips well. In so approving the Phillips well, however, the Supervisor provided for communication of the W1/2SW1/4 of said Section 20 (privately surveyed) in the event it should ultimately be determined that plaintiff's lease covered a portion of the lands in such section as follows:

"As the well location is 36.3 feet north of lands claimed by Continental Oil Company to be included in their Lease 14-20-603-407, drilling is approved subject to communitization of the applicable spacing unit for W1/2SW1/4 or SW1/4SW1/4, Section 20, Township 41 South, Range 24 East, if final adjudication results in diverse lease ownership in said unit. Said communitization shall be effective as of the date of this approval."

15. From the adverse rulings of the Supervisor referred to above, plaintiff appealed to the Commissioner

of Indian Affairs. The Commissioners' decision of October 27, 1958, sustained the Supervisor.

16. Plaintiff then appealed from the decision of the Commissioner to the Secretary of the Interior, defendant herein. By decision dated November 8, 1961, the defendant affirmed the decision of the Commissioner holding that the metes and bounds description in plaintiff's leases here involved was not controlling in determining the lands covered by plaintiff's leases. A copy of the decision of the Secretary is made a part hereof as Exhibit "D".

17. The action of the defendant in holding that the metes and bounds description in plaintiff's leases is not controlling in determining the lands leased was unlawful, arbitrary and unreasonable, in violation of applicable principles of law and the applicable statutes and regulations, and contrary to the decisions, rulings and established administrative policy and practice of the Department of the Interior. In so construing plaintiff's leases, the defendant did not give the effect required by sound legal principles to the plain and unambiguous language of the granting clause and description of the lands leased, as shown in plaintiff's leases and wrongfully gave weight to each of the following immaterial and extraneous considerations:

A clause in the leases dealing with bonus and
rentals:

This clause is not part of the granting clause nor the description and is unrelated to and has nothing whatever to do with the description of the lands leased. The clause simply provides for the manner in which the bonus and rentals are to be computed. To the extent that there is any ambiguity in this clause, such ambiguity can readily be cleared up by reference to extrinsic evidence which it would be proper to do for the purpose of overcoming ambiguity. Such extrinsic evidence shows this bonus and rental clause to be boiler plate and inserted in all

leases advertised for sale in Advertisement No. 41 regardless of its significance in any particular lease. The defendant improperly considered this ambiguous clause in construing the unambiguous granting clause and description.

A clause providing for a survey of the leased premises prior to drilling:

This clause has nothing whatever to do with any official governmental survey of townships and sections nor does it provide, as the Secretary implies, that lease boundaries shall follow and coincide with section lines. The defendant's reliance on this clause in construing the plain unambiguous language of the granting clause and description was unwarranted and unlawful.

Advertisement No. 41:

Advertisement No. 41 was an invitation for bids, the provisions of which were merged in the leases and superceded by the leases when they were formally entered upon, executed and approved. It was improper for the defendant to rely on this extrinsic evidence to arrive at the intention of the parties as shown by the plain unambiguous language of the granting clause and description in plaintiff's leases. The defendant's notions of what he assumed to be the general intent of Advertisement No. 41 are immaterial and were improper considerations for him to take into account in construing the leases here involved. Moreover, even if such extrinsic evidence could have been properly considered, the inferences drawn by the defendant were improper, unwarranted and not supported by the evidence.

Actions by the plaintiff:

Here the Secretary gives significance to the fact that plaintiff paid part of the cost of the official governmental survey referred to in paragraph 9 above and that plaintiff about four years after the leases here involved were entered upon filed with the Area Office of the Bureau of

Indian Affairs and the United States Geological Survey a plat showing a private survey of certain sections comprising part of the lands covered by plaintiff's leases. Such actions could not properly be considered in construing the plain and unambiguous language of the granting clause and description of plaintiff's leases nor could they change, modify or in any way affect the lands leased as shown in the leases. Even if such actions could properly be considered, the defendant as a matter of law wrongfully interpreted and gave improper effect to such actions.

Reliance by third parties to their detriment
upon actions of plaintiff:

Here the defendant gives significance to the filing of the plat by the plaintiff as set forth immediately above and the assumed reliance of Phillips-Aztec thereon to their detriment. There was not a scintilla of evidence in the record before the defendant that plaintiff filed such a plat for the purpose of inducing reliance thereon by Phillips-Aztec or anyone; and there is no evidence whatsoever that Phillips-Aztec or anyone else did in fact rely thereon. Elements of estoppel are simply not present. Even if such elements could have been properly found to exist by the defendant, the effect and conclusion reached by the defendant in depriving plaintiff of its leasehold interest in certain lands covered by its lease is unwarranted and contrary to law.

WHEREFORE, plaintiff prays:

1. That this Court review the action of the defendant in accordance with the provisions of Section 10 of the Administrative Procedure Act (5 U.S.C. 1009).
2. That it be declared and adjudged that the leases of plaintiff, Nos. 14-20-603-407 and 14-20-603-409, cover the lands described by the metes and bounds description contained therein.

3. That the defendant be directed to modify and implement his orders with respect to plaintiff's application for the drilling of its Navajo B-9 Well and plaintiff's protests with respect to Phillips-Aztec No. 10-A Desert Well and to take such further action as may be appropriate to implement the judgment of this Court.

4. That defendant pay to plaintiff the costs of this action.

5. That plaintiff have such other and further relief as is just and equitable.

CONTINENTAL OIL COMPANY, Plaintiff

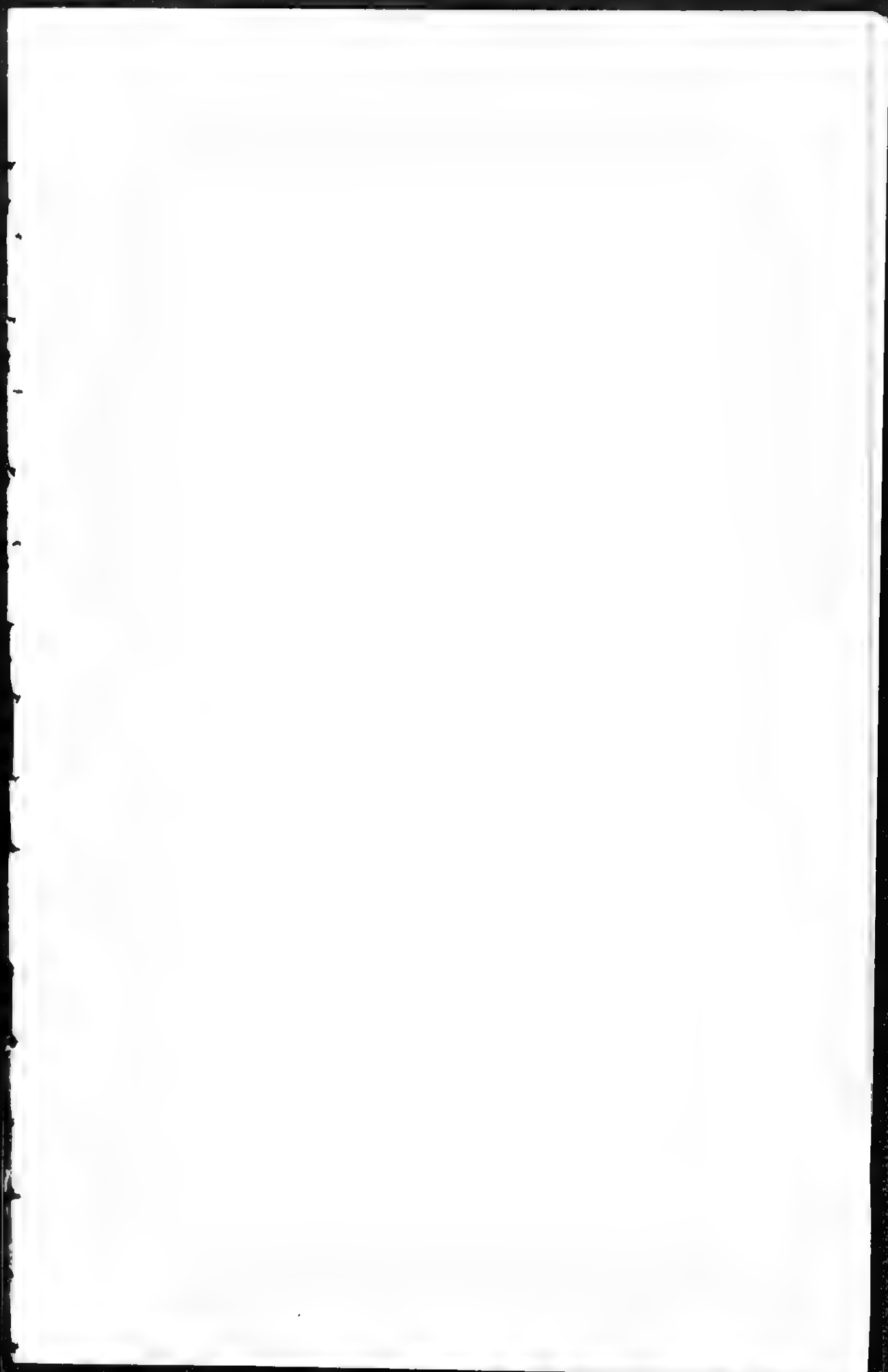
Samuel W. McIntosh

A. T. Smith

Floyd E. Radloff

Attorneys for Plaintiff

[Notary's jurat, 30 Jan. 1962]





JA 15

T 4 S

[Exhibit A to Complaint]

R.24.E

1	12	13	24	25
2	11	14	23	26
3	10	15	22	27
4	9	16	21	28
5	8	17	20	29
6	7	18	19	30

14 20 603 407

14 20 603 407



PLAINTIFF'S LEASES NOS. 14 20 603 407 AND 14 20 603 408

THE EXTERIOR TOWNSHIP BOUNDARIES REFLECT AN OFFICIAL SURVEY APPROVED MAY 10, 1953
THE INTERIOR SECTION LINES AND CORNERS REFLECT VARIOUS PRIVATE SURVEYS

EXHIBIT "A"

[Exhibit B to Complaint]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WINDOW ROCK AREA OFFICE
WINDOW ROCK, ARIZONA

March 24, 1953

Advertisement No. 41
Navajo Tribal Lands.

OIL AND GAS MINING LEASE SALE

Sealed bids will be received at the Window Rock Area Office, Window Rock, Arizona, for oil and gas leases on Navajo Tribal Lands on the tracts described herein which average about 2,560 acres each, and which involve a total of 214 tracts aggregating approximately 528,000 acres. Due to the size of this offering the bids are to be opened as follows:

Block A

53 Tracts totaling approximately 130,963.80 acres

Bids to be opened:

2:00 P.M. (MST) April 21, 1953.

Block B

52 Tracts totaling approximately 130,108.64 acres

2:00 P.M. (MST) May 1, 1953.

Block C

60 Tracts totaling approximately 147,094.49 acres

2:00 P.M. (MST) May 12, 1953.

Block D

49 Tracts totaling approximately 120,642 acres

2:00 P.M. (MST) May 22, 1953.

See legal descriptions and map attached showing designation of tract numbers and division of the areas into Blocks A, B, C, and D.

All of the herein described properties are offered separately to qualified bidders of the highest cash amounts per tract as a bonus for the privilege of leasing the land. The bonus is in addition to stipulated production royalties of 12-1/2 per cent, and rentals of \$1.25 per acre per annum (25 C.R.R. Part 186 as amended or supplemented). Separate leases will be issued on each tract. No substitute, conditional, or alternate bids will be considered or accepted. In case of tie bids, bidders submitting equal or tie bids may draw lots to determine successful bidder. Drilling propositions aside from those stated herein will not be considered.

The leases are offered without any special drilling requirements. Standard lease form 5-157 provides for drilling of offset wells necessary to protect the leased land from drainage by wells on adjoining lands, and for unit operations for development of a field or area, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior during the period of supervision.

The minimum bonus acceptable must be equal to the appraisalment of the representative of the U.S. Geological Survey. Each lease will be issued to the highest responsible qualified bidder in accordance with the Act of May 11, 1938 (52 Stat. 347), and the regulations approved May 31, 1938, as amended or supplemented (25 C.F.R. Part 186).

A deposit of 20 per cent of the bonus bid and 20 per cent of the advance rental for first year must accompany the bid and be in the form of a certified check or bank draft drawn on a solvent bank payable to the Treasurer of the United States. Amounts received from unsuccessful bidders will be immediately returned to persons submitting the remittances.

The successful bidder for any lease will be allowed 20 days from date on which the lease is sent or delivered to him in which to file the completed lease in this office, executed in sextuplicate, including a bond with responsible surety, balance of bonus bid, balance of first year's rental of \$1.25 per acre, and a filing fee of \$5.00. Sales will be cancelled and previous payments forfeited for the use and benefit of the Indians at expiration of the filing period, unless for good and sufficient reason an extension of the filing period is granted by the Area Director.

The right is reserved to reject any and all bids prior to approval of the leases. Should any bid be rejected through no fault of the bidder all money deposited will be returned.

The term of the leases will be 10 years from date of approval by the Commissioner of Indian Affairs or his authorized representative, and as much longer as the substances specified are produced in paying quantities.

Bond: Lessees shall furnish with each lease a surety bond, with responsible surety, in amounts as follows: For 160 acres, \$2,000.00; and for each additional 40 acres or part thereof, \$500.00; provided, the lessee may file one bond (form 5-154F) in the amount of \$15,000.00 covering each 10,240 acres of Navajo leases to which he is or may become a party. The successful bidders will also be required to pay the advertising costs hereof.

The following conditions will be incorporated in the leases:

1. This land is offered on a tract basis and the bids shall not be on an acreage basis. The acreage herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. No refund or additional payment of rental shall be required

to be made because of a difference in the acreage stated and that shown by the survey. Neither shall such a difference in acreage be grounds for any adjustment of the bonus.

2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U. S. Geological Survey, P. O. Box 997, Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat.

3. If so required by the Indian Service, the lessee shall condition under the direction of the Supervisor of the U. S. Geological Survey, any wells, drilled, which do not produce oil or gas in paying quantities as determined by said Supervisor, but which are capable of producing water satisfactory for domestic, agricultural or livestock use by the lessor. Adjustment of costs for conditioning of the well and for value of casing and equipment left in or on the well will be made in said cases where it is determined that the well will produce water satisfactorily as aforesaid.

4. Lessees shall employ Navajo labor in all positions for which they are qualified, including truck drivers, and shall protect the Indian grazing rights and other Indian rights to the surface of the lands.

5. Subject to the preference provided for above, the lessee, assignee, or sub-lessee shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

All bids should be marked on the outside of the envelope, "Bid for Oil & Gas Lease, Advertisement No. 41, Navajo Tribal Lands," to be opened at 2:00 P.M. (MST) on the dates designated for the tracts under Blocks A, B, C, and D, on page one hereof.

/s/ Allan G. Harper
Area Director.

Tract No. 152

T. 40S., R. 26 E., S.L.M.

Sections 33 and 34

T. 41 S., R. 26 E., S.L.M.

Sections 3 and 4

Containing a total of approximately 2318.9 acres.

Tract No. 153

T. 41 S., R. 26 E., S.L.M.

All of Sections 9, 10 and 15

The NE-1/4, SW-1/4, SW-1/4 of NW-1/4, SE-1/4
(except 14.4 acres) in SW-1/4 of SE-1/4 of Section
16

Containing a total of approximately 2243.4 acres.

Tract No. 154

T. 41 S., R. 26 E., S.L.M.

Sections 21, 22, 27 and 28

Containing a total of approximately 2372.4 acres.

Tract No. 155

T. 41 S., R. 26 E., S.L.M.

Sections 33 and 34

T. 42 S., R. 26 E., S.L.M.

Sections 3 and 4

Containing a total of approximately 2418.6 acres.

Tract No. 156

T. 42 S., R. 26 E., S.L.M.

Sections 9, 10, 15 and 16

Containing a total of approximately 2439.9 acres.

Tract No. 157

T. 42 S., R. 26 E., S.L.M.

Sections 27, 28, 33 and 34

Containing a total of approximately 2439 acres.

Tract No. 158

T. 43 S., R. 26 E., S.L.M.

All of Sections 3 and 10, and fractional Sections 4 and 9 as per government plat dated February 17, 1900.

Parcel 1: (Unsurveyed) Beginning at a point 10,032 feet west, along the boundary between the States of Utah and Arizona, and 28,083 feet north of point of origin, said point being the intersection of the meanders of the San Juan River and the west line of Lot 2, fractional Section 4 as per government plat of T. 43 S., R. 26 E., S.L.M.; thence northerly along said meanders of the San Juan River to the intersection of said meanders with the west line of Lot 1, fractional Section 4 of said township; thence south 2062.5 feet to the point of beginning.

Tract No. 76

Beginning at a point 94,053.3 feet west along the boundary between the States of Utah and Arizona and 95,040 feet north of point of origin, thence east 16,486.8 feet to the most southwesterly corner of fractional Section 32 as per government township plat of T. 40 S., R. 24 E., S.L.M. dated February 17, 1900; thence in a general westerly direction along the meanders of the San Juan River as per said township plat, to the most southwesterly corner of Section 31 as per said township plat, said last mentioned corner being also the southeast corner of fractional Section 36 as per government township plat of T. 40 S., R. 23 E., S.L.M. dated February 17, 1900; thence westerly, southerly and westerly along the meanders of the San Juan River as per said township plat, to the southwest corner of fractional Section 35 of said last mentioned township; thence south 3504.6 feet to the point of beginning; the west and south boundaries of said tract being common to the east and north boundaries of Tracts 66, 77 and a portion of 86, respectively. Tract 76 when surveyed will probably be described as follows:

T. 40 S., R. 23 E., S.L.M., Fractional Sections 35 and 36 south of the meanders of the San Juan River, and including all of the bed of the San Juan River.

T. 40 S., R. 24 E., S.L.M., Fractional Sections 31 and 32 southwesterly of the meanders of the San Juan River, and including all lands and that portion of the bed of the San Juan River lying southerly of the center thread of said river; Excepting therefrom all lands and that portion of the bed of the San Juan River lying northerly of the center thread of said river, and containing a total of approximately 990 acres.

Tract No. 83

Beginning at a point 83,853 feet west along the boundary between the States of Utah and Arizona and 21,120 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 82, 73, 84 and 92, respectively. Tract No. 83 when surveyed probably will be described as follows:

Sections 1, 2, 11 and 12 of T. 43 S., R. 23 E., S.-L.M., and containing a total of approximately 2560 acres.

Tract No. 84

Beginning at a point 83,853 feet west along the boundary between the States of Utah and Arizona and 10,560 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet, thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 83, 74, 85 and 93 respectively. Tract No. 84 when surveyed probably will be described as follows:

Sections 13, 14, 23 and 24 of T. 43 S., R. 23 E., S.L.M., and containing a total of approximately 2560 acres.

Tract No. 85

Beginning at a point 83,853 feet west along the boundary between the States of Utah and Arizona from the point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west and east boundaries of said tract being common to the south, east and west boundaries of Tracts 84, 75 and 94 respectively. Tract No. 85 when surveyed probably will be described as follows:

Sections 25, 26, 35 and 36 of T. 43 S., R. 23 E., S.L.M., and containing a total of approximately 2560 acres.

Tract No. 86

All of fractional Sections 5, T. 41 S., R. 24 E., S.L.-M., as per government township plat dated February 17, 1900.

(Unsurveyed) Beginning at a point 73,293 feet west along the boundary between the States of Utah and Arizona and 84,480 feet north of point of origin, thence north 8794.5 feet to the southeast corner of fractional Section 5 (surveyed); thence westerly and northerly along the meanders of the San Juan River as per township plat of T. 41 S., R. 24 E., S.L.M., to the northwest corner of said fractional Section 5; thence west 6646.2 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the west, south and east boundaries of said tract being common to the east, north and west boundaries of Tracts 77, 87 and 95 respectively. If surveyed, this portion of Tract No. 86 probably would be described as follows:

Fractional Section 5 lying south of the meanders of the San Juan River, all of Sections 6, 7 and 8, T. 41 S., R. 24 E., S.L.M., and including all of the bed of the San Juan River and containing a total of approximately 2560 acres.

Tract No. 87

Beginning at a point 73,293 feet west along the boundary between the States of Utah and Arizona and 73,920 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 86, 78, 88 and 96 respectively. Tract No. 87 when surveyed probably will be described as follows:

Sections 17, 18, 19 and 20 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

Tract No. 88

Beginning at a point 73,293 feet west along the boundary between the States of Utah and Arizona and 63,360 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 87, 79, 89 and 97 respectively. Tract No. 88 when surveyed probably will be described as follows:

Sections 29, 30, 31 and 32 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

Tract No. 89

Beginning at a point 73,293 feet west along the boundary between the States of Utah and Arizona and 52,800 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 88, 80, 90 and 98 respectively. Tract No. 89 when surveyed probably will be described as follows:

Sections 5, 6, 7 and 8 of T. 42 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

Tract No. 90

Beginning at a point 73,293 feet west along the boundary between the States of Utah and Arizona and 42,240 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to

the south, east, north and west boundaries of Tracts 89, 81, 91 and 99 respectively. Tract No. 90 when surveyed probably will be described as follows:

Sections 17, 18, 19 and 20 of T. 42 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

Tract No. 95

All of fractional Sections 3 and 4 of T. 41 S., R. 24 E., S.L.M., as per government township plat dated February 17, 1900.

(Unsurveyed) Beginning at a point 62,733 feet west along the boundary between the States of Utah and Arizona and 84,480 feet north of point of origin, thence north 6249.5 feet to the southwest corner of fractional Section 3, T. 41 S., R. 24 E., S.L.M., thence northerly and westerly along the meanders of the San Juan River, as per government plat of said township, to the southwest corner of Section 4 of said township; thence south 8494.5 feet; thence east 10,560 feet to the point of beginning; the west, south and east boundaries of said tract being common to the east, north and west boundaries of Tracts 86, 96 and 104 respectively. If surveyed, this portion of Tract No. 95 probably would be described as follows:

Fractional Sections 3 and 4 lying south of the meanders of the San Juan River and all of Sections 9 and 10, T. 41 S., R. 24 E., S.L.M., and including all of the bed of the San Juan River and containing a total of approximately 2560 acres.

Tract No. 96

Beginning at a point 62,733 feet west along the boundary between the States of Utah and Arizona and 73,920 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to

the south, east, north and west boundaries of Tracts 95, 87, 97 and 105 respectively. Tract No. 96 when surveyed probably will be described as follows:

Sections 15, 16, 21 and 22 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

Tract No. 97

Beginning at a point 62,733 feet west along the boundary between the States of Utah and Arizona and 63,360 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 96, 88, 98 and 106 respectively. Tract No. 97 when surveyed probably will be described as follows:

Sections 27, 28, 33 and 34 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

Tract No. 27

Beginning at a point 147,213 feet west along the boundary between the States of Utah and Arizona and 10,560 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 26, 17, 28 and 37 respectively. Tract No. 27 when surveyed probably will be described as follows:

Sections 13, 14, 23 and 24 of T. 43 S., R. 21 E., S.L.M., and containing a total of approximately 2560 acres.

Tract No. 28

Beginning at a point 147,213 feet west along the boundary between the States of Utah and Arizona from point of

origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west and east boundaries of Tracts 27, 18 and 38 respectively. Tract No. 28 when surveyed probably will be described as follows:

Sections 25, 26, 35 and 36 of T. 43 S., R. 21 E., S.L.M., and containing a total of approximately 2560 acres.

Tract No. 36

Beginning at a point 136,653 feet west along the boundary between the States of Utah and Arizona and 23,760 feet north of point of origin, and being also the east $1/4$ corner of Section 8, T. 43 S., R. 22 E., S.L.M., (unsurveyed) as described in the certain oil and gas lease to Byrd Frost, Inc., and numbered I-149-Indian 7180; thence north 7920 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 1 mile more or less to the west boundary of the above-mentioned Oil and Gas Lease; thence along said boundary north 2640 feet; thence east 5280 feet to the point of beginning; the west, north, east and a portion of the south boundaries of said tract being common to the east, south, portion of the west and north boundaries of Tracts 26, 35, 46 and 37 respectively. Tract No. 36 when surveyed will probably be described as follows:

Sections 5, 6, 7 and the N- $1/2$ of 8 of T. 43 S., R. 22 E., S.L.M., and containing a total of approximately 2240 acres.

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[This page left blank in order most efficiently to
accommodate exhibit pages which follow]

U-1157 70352

[Exhibit C to Complaint]

Contract No. 14-20-603-407

Form 8-157
November 1947

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

OIL AND GAS MINING LEASE—TRIBAL INDIAN LANDS

Navajo TRIBE, STATE OF Utah

THIS INDENTURE OF LEASE, made and entered into in ^{sixuplicate}~~quadruplicate~~ this 13th day of October, 1953, by and between Sam Ahloneh, Chairman,
Navajo Tribal Council

of Maricopa County, State of Arizona, for and
on behalf of the Navajo Tribe of Indians, designated herein as
lessor, and Continental Oil Company

of Denver 2, State of Colorado, herein designated as
lessee:

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WITNESSETH

1. Lessor, in consideration of a cash bonus of \$15,027.20., paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of

San Juan, State of Utah, and more particularly described as follows:

For land description see rider attached hereto.

containing _____ acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

2. The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased.

3. In consideration of the foregoing, the lessee hereby agrees:

(a) Bond.—To furnish such bond as may be required by the regulations of the Secretary of the Interior, with satisfactory surety, or United States bonds as surety therefor, conditioned upon compliance with the terms of this lease.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to execution by lessor:

Katherine McLean

Sam A. B. B. [SEAL]
Chairman, Navajo Tribal Council

P. O. Window Rock, Ariz.

Therese McLean

P. O. Window Rock, Ariz.

Two witnesses to execution by lessee:

Al Brien

Continental Oil Company

By [Signature] [SEAL]
Vice President

P. O. Denver, Colo.

Donna

P. O. Denver, Colo.

Attest: [Signature]
Asst. Secretary

ACKNOWLEDGMENT OF LESSOR

STATE OF Arizona }
COUNTY OF Apache }

Before me, a notary public, on this 4th day of Nov. 1955, personally appeared

Sam A. B. B.

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to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he

executed the same as his free and voluntary act and deed for the use and purposes therein set forth.

(My commission expires My Commission expires January 6, 1956

[Signature]
Notary Public

UNITED STATES
DEPARTMENT OF THE INTERIOR
Window Rock, Arizona

DEC 10 1953

The within lease is hereby approved.

[Signature]

Acting Director

Filed for record this day of , 19 at o'clock m.

Rental received, \$ 32.00

By

Rider to Tribal Land Oil & Gas Mining Lease Contract No. 14-20-603-407, Continental Oil Company, Denver 2, Colorado, Lessee.

Point of origin to which most of the unsurveyed portion of the following tract is referred and described in the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.

Tract No. 88

Beginning at a point 73,293 feet west along the boundary between the States of Utah and Arizona and 63,360 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 87, 79, 89 and 97 respectively. Tract No. 88 when surveyed probably will be described as follows:

Sections 29, 30, 31 and 32 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

1. This land was offered on a tract basis and the bids were not on an acreage basis. The acreage herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. No refund or additional payment of rental shall be required to be made because of a difference in the acreage stated and that shown by the survey. Neither shall such a difference in acreage be grounds for any adjustment of the bonus.

2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with

substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rick, Arizona, and in duplicate with the Supervisor, U. S. Geological Survey, P. O. Box 6721, Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat.

3. If so required by the Indian Service, the lessees shall condition under the direction of the Supervisor of the U. S. Geological Survey, any wells drilled, which do not produce oil or gas in paying quantities as determined by said Supervisor, but which are capable of producing water satisfactory for domestic, agricultural or livestock use by the lessor. Adjustment of costs for conditioning of the well and for value of casing and equipment left in or on the well will be made in said cases where it is determined that the well will produce water satisfactorily as aforesaid.

4. Lessees shall employ Navajo labor in all positions for which they are qualified, including truck drivers, and shall protect the Indian grazing rights and other Indian rights to the surface of the lands.

5. Subject to the preference provided for above, the lessee, assignee, or sublessee shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

Rider to Tribal Land Oil & Gas Mining Lease Contract No. 14-20-603-409, Continental Oil Company, Denver 2, Colorado, Lessee.*

Point of origin to which most of the unsurveyed portion of the following tract is referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.

Tract No. 97

Beginning at a point 62,733 feet west along the boundary between the States of Utah and Arizona and 63,360 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 96, 88, 98 and 106 respectively. Tract No. 97 when surveyed probably will be described as follows:

Sections 27, 28, 33 and 34 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

1. This land was offered on a tract basis and the bids were not on an acreage basis. The acreage herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. No refund or additional payment of rental shall be required to be made because of a difference in the acreage stated and that shown by the survey. Neither shall such a difference in acreage be grounds for any adjustment of the bonus.

* Lease form and signature page substantially identical to those for Contract No. 14-20-603-407, appearing herein at JA pages 30-33.

2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U. S. Geological Survey, P. O. Box 6721, Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat.

3. If so required by the Indian Service, the lessee shall condition under the direction of the Supervisor of the U.S. Geological Survey, any wells, drilled, which do not produce oil or gas in paying quantities as determined by said Supervisor, but which are capable of producing water satisfactory for domestic, agricultural or live-stock use by the lessor. Adjustment of costs for conditioning of the well and for value of casing and equipment left in or on the well will be made in said cases where it is determined that the well will produce water satisfactorily as aforesaid.

4. Lessees shall employ Navajo labor in all positions for which they are qualified, including truck drivers, and shall protect the Indian grazing rights and other Indian rights to the surface of the lands.

5. Subject to the preference provided for above, the lessee, assignee or sublessee shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

[Exhibit D to Complaint]

APPEAL OF CONTINENTAL OIL COMPANY

IA-1014 Decided November 8, 1961

Indian Lands: Oil and Gas Leasing (Tribal Lands)

Where an oil and gas lease of unsurveyed land describes the leased property by metes and bounds but contains a rider stating that when the property is surveyed the description will be by sections, the section description will control upon completion of the survey and the metes and bounds description will be considered as having served only a temporary purpose.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

IA-1014 November 8, 1961

In the matter of Navajo	: Appeal by Continental Oil
Tribal Leases Serial	: Company to Secretary of
Nos. 14-20-603-407 and	: the Interior from Decision
14-20-603-409	: of Commissioner of In-
	: dian Affairs
	:
	: Affirmed

APPEAL FROM THE BUREAU OF INDIAN AFFAIRS

The Continental Oil Company of Denver, Colorado, has appealed to the Secretary of the Interior from a decision of the Commissioner of Indian Affairs, dated October 27, 1958, upholding a decision of the Area Director on a boundary dispute which was adverse to Continental. ^{1/}
As the boundary dispute resulted from Continental's claim to a strip of land which is either in the north part of its Navajo Tribal oil and gas leases or in the south

part of leases held by Phillips Petroleum Company and Aztec Oil and Gas Company, these latter two companies were permitted to file a joint brief in opposition to Continental's brief. The strip of land in question is about 624 feet wide and four miles long, and contains approximately 300 acres. The Commissioner's decision also had the effect of denying Continental the right to drill its Navajo B-8 Well, and of approving the drilling of Phillips' No. 10-A Desert Well.

The additional area claimed by Continental results from a metes and bounds description employed by it in a private survey. A survey following section lines, however, does not show any conflict with the Phillips-Aztec leases. Both types of survey plats were filed by Continental with the Area Director at Window Rock, Arizona, and the Regional Oil and Gas Supervisor at Roswell, New Mexico. The metes and bounds survey plat was filed about six months after the section line survey plat. It is the later metes and bounds survey which is relied upon by Continental in this appeal. In the official boundary survey made by the Bureau of Land Management and approved May 10, 1954, the shortages in the distances between the north and south boundaries had to be put in the south tier of quarter sections because in an earlier official survey the township and section lines in the northeast part of the township had been surveyed and laid out. The area reduced by this cadastral survey was moved by Continental to a strip north of its north boundary to give rise to its claim.

1/ The original decision was by the Regional Oil and Gas Supervisor, U.S. Geological Survey, and was upheld by the Area Director.

It should be stated at this point that in the advertisement for bids the leases were described by metes and bounds. Such descriptions were qualified, however, in several important respects. They were, for instance, prefaced by the following paragraph:

"Point of origin to which most of the unsurveyed portion of following tract is referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner."

The descriptions were then followed by the following rider, which is likewise contained in each lease:

"1. This land was offered on a tract basis and the bids were not on an acreage basis. The acreage herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. No refund or additional payment of rental shall be required to be made because of a difference in the acreage stated and that shown by the survey. Neither shall such a difference in acreage be grounds for any adjustment of the bonus.

"2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U. S. Geological Survey, P. O. Box 6721, Roswell, New Mexico, Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat."

Also included in the descriptions of Continental leases No. 14-20-603-407 and No. 14-20-603-409 was the following as to Tract No. 88:

"Tract No. 88 when surveyed probably will be described as follows:

"Sections 29, 30, 31 and 32 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres."

A similar provision was attached to Tract No. 97, reading as follows:

"Tract No. 97 when surveyed probably will be described as follows:

"Sections 27, 28, 33 and 34 of T. 41 S., R. 24 E., S.L.M. and containing a total of approximately 2560 acres."

As the Commissioner has pointed out in his decision, when a township is surveyed against previously established lines exterior sections may be of varied size. In surveying townships which were previously partly surveyed, the north-south overages or shortages are usually placed in the north end of the township. However, this rule may be varied when conditions warrant, and the overages and shortages placed in the south end of the township. This was done in the instant case because it was desired to (1) provide a plan which would satisfy the basic laws on surveys and the established procedures of the Bureau of Land Management; (2) provide maximum regularity so that future subdivisional surveys of section, tract or lease boundaries would be facilitated; and (3) to give substantial compliance with the greatest number of tract boundaries which are described in detail and delineated in the Navajo lease sale advertisement. Thus, the projected survey of the southerly quarter sections was minus the approximate 624-foot strip referred to, but the area was included in the metes and bounds description.

Prior to approval of the leases herein involved, a group of oil companies requested that a public land survey be made of the area by the Bureau of Land Management. Such survey was to be of township boundaries only, with section and quarter section corners established on the perimeter, but was not to include an interior section survey. This survey was undertaken by the Bureau of Land Management between August 7 and November 3, 1953, and it was pointed out in the preliminary discussions that with the township boundaries established, any private or company surveyor could locate wells and lease tract boundaries within such township. The oil companies, of which Continental was one, paid for the Bureau of Land Management survey.

On the basis of the township boundaries thus established, both Continental and Phillips-Aztec, preparatory to drilling, filed private surveys following section lines. These surveys coincided as to the boundaries of the respective leases, and no conflict developed until Continental filed a subsequent metes and bounds survey which included the approximate 624 foot-wide strip.

The Commissioner, in his decision, stressed the point that it was the intent of the leasing operation to make boundaries conform to the United States public land surveys as required by 25 CFR 171.8. The advertisements indicated that a survey would be made and would probably include certain designated sections. Metes and bounds descriptions, the Commissioner held, were used in the advertisements solely for the purpose of locating the unsurveyed lands as closely as possible until surveyed.

It is Continental's position that with approval of its leases on December 10, 1953, it became a party to binding lease contracts which were subject to no modification or further interpretation. Most of the authorities cited by Continental deal with general rules of contract construction which are generally recognized and about

which there is no dispute in this case. What Continental fails to take into consideration, however, is that these contracts on their face provided for certain procedures to be followed and for modifications if found necessary. The following points, all in the advertisements for bids and incorporated in the leases, are illustrative:

1. It was clearly indicated that a survey was to be made which would describe the leased areas by sections rather than by the original metes and bounds description.
2. The area covered by a lease was to conform to the system of public land surveys.
3. The land was offered on a tract basis and the bids were not on an acreage basis, the acreage being stated for the sole purpose of computing annual rental prior to a survey.
4. Agreement to "abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases".

When these conditions are given their full force and effect, it is seen that the contract has more elasticity than Continental appears to recognize. By the simple expedient of filing a survey based on metes and bounds, it undertakes to make these provisions of the contract meaningless. Such conditions were not only intended to have meaning but also serve to show that it was the intent of the parties to conduct the leasing operations in a manner which would eliminate conflict and overlapping. Intent, it is recognized in the briefs, is an important element of contract construction.

Aside from the numerous Federal and State decisions cited by the parties, reference is made to several rulings by the Bureau of Land Management. The parties are in complete disagreement as to the interpretation of these rulings and their applicability to the instant case. However, since these cases relate to the leasing of unsur-

veyed public lands on a non-competitive basis under the Mineral Leasing Act of 1920, it is not believed they have any bearing on tribal oil and gas leases, with specific conditions applicable, and where the bidding is made after notice and advertisement calling for sealed bids. (See 25 U.S.C. 396 (a to f)).

Continental states that until there has been an official interior section survey, the land covered by leases cannot be identified by legal sections. This ignores the surveying rule that where four sides of a survey have been established, the interior lines may be accurately projected. Such a position also disregards some of the provisions of the manual of instructions of the Bureau of Land Management, which are in accepted usage. For instance, the manual provides in section 8 as follows:

"Fourth. That the center lines of a regular section are to be straight, running from the quarter-section corner on one boundary of the section to the corresponding corner on the opposite section line."

Section 162 of the manual contains this provision:

"(d) For position, corresponding section corners upon the opposite boundaries of the township to be so located that they may be connected by true lines which will not deviate more than 21' from cardinal."

Continental also contends that surveys should be extended from south to north and from east to west. This is normally true but the rule is not inviolate. The manual, at section 225, treats the subject in the following manner:

"*** Preference should be given to extending all surveys from south to north and from east to west, but if a better control is available by reversing on one or both directions, thus resulting in a

simpler and better survey in respect to minimizing the number of extra corners as fractional lots, such reversal of procedure is fully warranted."

That Continental recognized the propriety and legality of lease descriptions by sections which conform to the system of public land surveys is shown by its conduct in drilling its Davis No. 1 Well. In December, 1956, having filed its survey plat showing sections, Continental applied for and was given permission to drill the Davis No. 1 Well. This well was a producer by March, 1957, and it was not until August, 1957, that Continental submitted its survey plat by metes and bounds, which would give it access to the 624-foot strip. Having once asserted a boundary line and acted in accordance therewith to its benefit, it is difficult to see how Continental can later claim a different boundary, particularly when it is in conflict with boundaries recognized as having been established by other lessees and acted upon by them.

Continental emphasizes that it has at all times paid and the lessor, Indian Tribe, has accepted rental on each of its leases on the basis that each of its leases on the basis that each of its leases contained 2,560 acres. This could have no possible bearing on the rights of Phillips-Aztec in the present boundary dispute. The payment of rentals would be based upon the provisions of the leases, which stipulate that after a survey had been made, rental would be computed on the basis of acreage as shown by the survey.

Continental also claims some sort of preference over Phillips-Aztec because its leases bear an earlier date. These leases were only part of a number of leases disposing of 528,000 acres of land. All were advertised at the same time and constituted a single operation. The dates of issuance could be no more than a matter of processing.

On May 24, 1960, at the request of Continental, an oral argument in the case was had before the Deputy Solicitor in Washington, D.C. All three of the oil companies were represented by counsel at the argument, which was also attended by representatives of the Bureau of Land Management and the Bureau of Indian Affairs. The arguments presented were confined for the most part to emphasis of points which had been made in the original briefs, and nothing significant in the way of new material was offered.

Accordingly, the appeal of Continental is dismissed, and the decision of the Commissioner of Indian Affairs affirmed.

/s/ John A. Carver, Jr.
Assistant Secretary of
the Interior

[Filed May 16, 1962]

**ANSWER OF THE SECRETARY
OF THE INTERIOR**

First Defense

The complaint fails to state a claim upon which relief can be granted against the defendant.

Second Defense

Aztec Oil and Gas Company and Phillips Petroleum Company are indispensable parties to this action but neither can be served with process within the jurisdiction of this Court.

Third Defense

The Navajo Tribe of Indians is an indispensable party to this action but it cannot be served with process within the jurisdiction of this Court. The immunity of the Nav-

ajo Tribe of Indians from suit has not been waived by Congress.

Fourth Defense

The United States is an indispensable party to this action but Congress has not consented to the maintenance of this suit.

Fifth Defense

1. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 1 of the complaint concerning "the value of the property involved." The defendant is advised and believes that the remaining allegations in paragraph 1 of the complaint are conclusions of law which do not require answer and, therefore, these allegations are neither admitted nor denied.

2. The defendant admits that plaintiff has no further administrative remedy available to it at this time. The defendant denies that there is any actual and justiciable controversy between him and plaintiff.

3. The defendant admits that plaintiff is the lessee and owner of the oil and gas leases granted to plaintiff by the Navajo Indian Tribe and approved by authority of the Secretary of the Interior. The defendant admits that those leases are identified as Contract Nos. 14-20-603-407 and 14-20-603-409, respectively, and that each affects certain lands in San Juan County, Utah. The defendant denies that he has acted unlawfully, unreasonably or arbitrarily in connection with such leases or in any way affecting the plaintiff.

4. The defendant admits the allegations in paragraph 4 of the complaint except that the defendant avers that the complete advertisement No. 41 is material to the issues tendered by the complaint.

5. The defendant is advised and believes that the truth of the allegations in paragraph 5 of the complaint

is a matter of judicial notice or matter of law which does not require answer and, therefore, these allegations are neither admitted nor denied.

6. The defendant admits the allegations in paragraph 6 of the complaint.

7. The defendant admits that under date of October 13, 1953, plaintiff and the Navajo Tribe of Indians entered into the oil and gas leases and that under date of December 10, 1953, these leases were approved by authority of the Secretary of the Interior, as alleged in the complaint. The defendant admits that plaintiff paid the first year's rental at the rate of \$1.25 per acre computed on 2,560 acres in each lease, or \$3,200.00 on each lease. The defendant denies that plaintiff has since then continued to pay rentals of \$3,200.00 annually or that such payments as plaintiff has made under the leases have had "the approval of the Department of the Interior."

8. The defendant admits the allegations in paragraph 8 of the complaint.

9. The defendant admits the allegations in paragraph 9 of the complaint except that he avers that the survey described therein was approved and accepted by authority of the Secretary of the Interior.

10. The defendant avers that sections 27, 28, 29, 30, 31, 32, 33 and 34 in Township 41 South, Range 24 East, S.L.M., comprise all of the lands covered by plaintiff's leases. The defendant admits that plaintiff filed copies of plats of a survey, as alleged in paragraph 10 of the complaint. The defendant is without knowledge or information as to the truth of the allegations concerning plaintiff's purpose in having the survey and plats made or the deficiencies which plaintiff found in the plats.

11. The defendant admits the allegations in paragraph 11 of the complaint.

12. The defendant admits that in June 1957, Phillips Petroleum Company commenced to drill a well in section 22 of Township 40 South, Range 24 East, S.L.M., to offset the Davis well, as alleged in the complaint. The defendant denies that the well drilled by Phillips Petroleum Company was on land leased to plaintiff. The defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 12 of the complaint.

13. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the complaint except that he admits that in August 1957, plaintiff filed plats as alleged in that paragraph of the complaint.

14. The defendant admits the allegations in paragraph 14 of the complaint.

15. The defendant admits the allegations in paragraph 15 of the complaint.

16. The defendant admits that plaintiff appealed to him from the decision of the Commissioner of Indian Affairs and that, by decision dated November 8, 1961, the defendant affirmed the decision of the Commissioner of Indian Affairs. The defendant admits that Exhibit "D" to the complaint is a true copy of that decision. The defendant is advised and believes that he is not required to answer the allegations concerning the grounds of his decision and, therefore, these allegations are neither admitted nor denied.

17. The defendant is advised and believes that the allegations in paragraph 17 of the complaint are either conclusions or arguments of law which do not require answer and, therefore, these allegations are neither admitted nor denied.

WHEREFORE, having fully answered, the defendant,

prays that the complaint be dismissed and that he have judgment for his costs.

/s/ Ralph S. Boyd
Attorney, Department of
Justice
Attorney for Defendant

[Copy sent May 1962]

[Filed June 22, 1962]

ORDER

Upon consideration of the Motion of Phillips Petroleum Company and Aztec Oil & Gas Co. for leave to intervene as parties defendant in the above-entitled action,

IT IS ORDERED that Phillips Petroleum Company and Aztec Oil & Gas Co. are granted leave to intervene in said action as parties defendant.

U. S. District Judge

[Filed June 25, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONTINENTAL OIL COMPANY,

Plaintiff,

v.

STEWART L. UDALL,
Secretary of the Interior,

Defendant,

PHILLIPS PETROLEUM COMPANY
and
AZTEC OIL & GAS CO.,

Intervenors.

Civil Action
No. 366-62

ANSWER OF PHILLIPS PETROLEUM COMPANY
AND AZTEC OIL & GAS CO.

For answer to the complaint of the plaintiff in the above-entitled cause, Phillips Petroleum Company and Aztec Oil & Gas Co., hereinafter called "intervening defendants", file this, their joint answer.

I

For a first defense, intervening defendants answer each numbered paragraph of the complaint as follows:

1. Admit that the value of the property involved exceeds \$10,000, and state that they are advised and believe that the remaining allegations contained in paragraph 1 are conclusions of law and do not require an answer and hence neither admit nor deny said allegations.

2. State that they have no knowledge or information sufficient to form a belief as to the allegations contained

in the second and third sentences of paragraph 2, and that they are advised and believe that the remaining allegations contained in paragraph 2 are conclusions of law and do not require an answer and hence neither admit nor deny said allegations.

3. Admit the allegations contained in the first two sentences of paragraph 3, deny the allegations contained in the third sentence of paragraph 3, and state that they are advised and believe that the remaining allegations contained in paragraph 3 do not require an answer and hence neither admit nor deny said allegations.

4. Admit the allegations contained in paragraph 4, except that they deny that each tract covering unsurveyed lands was described in the advertisement by metes and bounds only, deny that the complete Advertisement No. 41 is immaterial to this case, and state that the complete Advertisement No. 41 speaks for itself as to the manner of description.

5. State that they are advised and believe that the allegations contained in paragraph 5 are legal conclusions which do not require an answer, and hence neither admit nor deny said allegations.

6. Admit the allegations contained in paragraph 6.

7. Admit the allegations contained in the first two sentences of paragraph 7, state that they are advised and believe that the allegations as to the provisions of the leases and of Advertisement No. 41 are legal conclusions that do not require an answer, and that those documents speak for themselves, and hence neither admit nor deny said allegations, and state that they are without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 7.

8. Admit the allegations contained in paragraph 8, except that they deny that the tracts were described in the advertisement and leases by metes and bounds only and allege that the complete Advertisement No. 41 and the

leases speak for themselves as to the manner of descriptions, and further deny that F. D. Jernigan was successful in a bid for unsurveyed Tract 97 and allege that the references to said Tract should be to Tract 96.

9. Admit the allegations contained in paragraph 9, except that they allege that the survey described therein was approved and accepted by the Secretary of the Interior.

10. Admit the allegations contained in paragraph 10, except that they deny that the sections named comprised only part of plaintiff's leases, deny that the plats mentioned therein were not in strict compliance with the lease provisions calling for the lessee to survey the leased premises prior to drilling and state that they have no knowledge or information sufficient to form a belief as to the purpose of plaintiff's filing the survey mentioned therein except to comply with those lease provisions.

11. State that they have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 11, except that they admit that the Davis Oil Company well in the NE-1/4 NE-1/4 of said Section 27 was the initial discovery well of oil in the White Mesa Field.

12. Deny the allegations contained in paragraph 12, except that they admit that on or about June 19, 1957, Phillips Petroleum Company commenced to drill in Section 22, Township 41 South, Range 24 East a well offsetting the Davis well.

13. State that they have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13, except that they admit that representatives of Phillips Petroleum Company attended a meeting on or about April 11, 1957, at which boundary questions in the White Mesa Field were discussed, and that on or about August 14, 1957, plaintiff notified Phillips Petroleum Company that plaintiff claimed that the Phillips'

well referred to in paragraph 12 of the complaint was located on plaintiff's lease.

14. Admit the allegations contained in paragraph 14.

15. Admit the allegations contained in paragraph 15.

16. Admit the allegations contained in paragraph 16 except that they state that they are advised and believe that the allegations concerning the grounds of the decisions of the Secretary and the Commissioner are legal conclusions that do not require an answer and therefore neither admit nor deny these allegations.

17. State that they are advised and believe that the allegations contained in paragraph 17 are conclusions of law and do not require answer and hence neither admit nor deny these allegations.

II

For a second defense intervening defendants allege that the complaint fails to state a claim upon which relief can be granted.

III

For a third defense intervening defendants allege that by virtue of plaintiff's conduct in filing survey plats in December 1956 and January 1957 as required by its leases, which survey plats constituted a contemporaneous construction of the boundary descriptions in said leases and a practical location of the boundary lines of said leases, upon which construction and location the Department of the Interior, through the Supervisor of the United States Geological Survey, and intervening defendants conducted themselves in reliance, and upon which plaintiff relied to its benefit, plaintiff is concluded and estopped from making claims as to the boundaries of its leases inconsistent with those shown by said survey plats.

WHEREFORE, the intervening defendants pray that the complaint be dismissed with costs to the defendants.

Hugh B. Cox
Henry P. Sailer
Attorneys for Phillips
Petroleum Company and
Aztec Oil & Gas Co.

James Mullen
Attorney for Phillips
Petroleum Company

Quilman B. Davis
Attorney for Aztec Oil &
Gas Co.

[Filed Jan. 13, 1965]

STIPULATION

1. Subject to the objections and contentions of the parties, as hereinafter set out with respect to deletions and additions, and the right of any party to move for amendment of the administrative record, as hereinafter set forth, it is hereby stipulated that the following described documents, copies of which are attached hereto and marked as exhibits with corresponding numbers, constitute the administrative record in this proceeding:

1. Navajo tribal leases 14-20-603-353, 355, 407 and 409.
2. A letter dated July 31, 1958 from the General Superintendent to the Commissioner, Bureau of Indian Affairs, together with its enclosures.
3. A letter dated July 23, 1958, from Mr. James Mullen to the Supervisor, United States Geological Survey.
4. A letter dated July 24, 1958, from Mr. F. E. Radloff to the Supervisor, United States Geological Survey, enclosing an "Amendment of Appeal."
5. A letter received September 18, 1958, by the Commissioner, Bureau of Indian Affairs, transmitting maps.
6. A letter dated September 19, 1958, from Mr. Q. B. Davis to Mr. Fred H. Massey, Acting Commissioner of Indian Affairs.
7. A letter dated September 23, 1958, from Mr. A. T. Smith to the Commissioner of Indian Affairs.
8. A letter dated September 26, 1958, from Mr. Q. B. Davis to the Commissioner of Indian Affairs.
9. The Commissioner's decision dated October 27, 1958.

10. Notice of appeal by Continental Oil Company to the Secretary of the Interior, which includes a 33-page argument.
11. Supplemental statement and affidavit of Mr. A. T. Smith.
12. Statement of facts by Minerals Section, Branch of Realty, Bureau of Indian Affairs, dated December 12, 1958 (with attached maps).
13. Brief of Phillips Petroleum Company and Aztec Oil & Gas Company in opposition to appeal, filed January 26, 1959.
14. Reply brief of Continental Oil Company to brief of Phillips and Aztec, filed February 25, 1959.
15. A letter dated March 10, 1959, and enclosures, from Mr. John P. Akolt to the Secretary of the Interior.
16. Continental's supplemental reply brief dated June 21, 1960.
17. Lease Sale Advertisement No. 41 dated March 24, 1953.
18. Official survey of township boundaries approved May 10, 1954.
19. Special instructions of the Bureau of Land Management, Division of Cadastral Engineering, for conducting the township boundary survey dated July 28, 1953.
20. Opinion of the Assistant Secretary of the Interior dated November 8, 1961.
21. Utah Protraction Diagram No. 50, Bureau of Land Management, Area 2, Cadastral Engineering, dated March 7, 1961, which represents the official protraction of the rectangular system of surveys and shows the areas of unsurveyed sections in Ts. 40, 41, 42 and 43 S. Rs. 22, 23 and 24 E., T. 41 S., R. 25 E.; and Ts. 42 and 43 S., Rs. 25 and 26 E.; of the Salt Lake Meridian, Utah.

2. Plaintiff, Continental Oil Company, contends that the documents listed as Nos. 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16 and 19 in the foregoing list should not be included in the administrative record on the grounds that such documents consist of briefs of the parties and inter office memorandums within the Department of the Interior, are immaterial and incompetent and under applicable authorities are not properly a part of the administrative record. Plaintiff also contends that the following described documents, copies of which are attached hereto and marked Exhibit A, should be made a part of the administrative record in this case:

Examples of, and references to, certain Indian tribal land oil and gas leases found in the records of the Department of the Interior which describe the lands by metes and bounds and which were entered into and approved by the Secretary prior to the sale of plaintiff's leases here involved.

Plaintiff reserves the right to object to inclusion in the record of the first above-described documents and to exclusion from the record of the last above-described documents.

3. Plaintiff has entered into this stipulation for the purpose of expediting the presentation to the Court of the issue of what documents and instruments should properly and legally comprise the administrative record in this case. Plaintiff reserves its objections to the administrative record submitted herewith, as above set forth, and all parties reserve the right to submit a motion to amend such administrative record.

/s/ Samuel W. McIntosh
Attorney for Plaintiff

Thos. L. McKevitt
Attorney, Department of Justice
Attorney for Defendant

/s/ Henry P. Suler
Attorney for Intervenors

[Filed Jan. 14, 1965]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONTINENTAL OIL COMPANY,
Plaintiff

v.

Civil Action

STEWART L. UDALL,
Secretary of the Interior,

No. 366-62

Defendant,

PHILLIPS PETROLEUM COMPANY,
and AZTEC OIL & GAS CO.,

Intervenors

MOTION TO AMEND
ADMINISTRATIVE RECORD

Continental Oil Company, by its attorneys, moves the Court to amend the administrative record stipulated in the above cause by striking therefrom Items numbered 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, and 19 of the stipulation, and by adding thereto certain documents, marked Exhibit A to the Stipulation, being examples of, and references to, certain Indian tribal land oil and gas leases found in the records of the Department of the Interior which describe the lands by metes and bounds, and which were entered into and approved by the Secretary prior to the sale of plaintiff's leases here involved.

This motion is filed pursuant to the provisions of the stipulation whereby all parties reserve the right to submit a motion to amend the administrative record.

Memorandum of Points and Authorities in support of this Motion is filed herewith.

Respectfully submitted,

CONTINENTAL OIL COMPANY
Plaintiff

Samuel W. McIntosh
1266 National Press Building
Washington, D.C.

A. T. Smith
Continental Oil Building
Denver, Colorado 80202

Floyd E. Radloff
Continental Oil Building
Denver, Colorado 80202
Attorneys for Plaintiff

[Filed March 17, 1965]

ORDER

This case having come on for hearing on plaintiff's motion "to amend administrative record" and it appearing to the Court that this motion should be deferred for consideration by the trial judge or in connection with any motion for summary judgment that may be filed,

NOW, THEREFORE, IT IS ORDERED:

That the motion be and hereby is continued for consideration by the trial judge or by the judge hearing any motion for summary judgment.

Dated this ____ day of March, 1965.

JUDGE
United States District Court

Seen:

Attorney for Plaintiff

Attorney for Intervenor

Submitted:

Thos. L. McKeivitt
Attorney for Defendant

RECEIVED

JUL 21 1958

U. S. GEOLOGICAL SURVEY
ROSWELL, NEW MEXICO

COMMISSIONER OF INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR
WASHINGTON, D. C.

IN THE MATTER OF NAVAJO) APPEAL AND REQUEST FOR
TRIBAL LEASES, SERIAL NOS.) DETERMINATION OF LEASE
14-20-603-407 AND) BOUNDARIES
14-20-603-409)

Comes now CONTINENTAL OIL COMPANY, and says:

Continental is the lease owner under the above identified Navajo Tribal Leases (except for four eighty-acre tracts originally covered by the subject leases but assigned by Continental to one Davis Oil Company, which eighty-acre tracts are not pertinent to matters here involved). Phillips Petroleum Company and Aztec Oil & Gas Company, in the proportions of one-half each, are the owners of the leasehold interest under two other Navajo Tribal leases identified as Lease No. 14-20-603-353 and No. 14-20-603-355. The Phillips and Aztec leases adjoin the Continental leases to the north and Phillips and Aztec have made some claim to the north 624 feet of the Continental leases.

On or about May 9, 1958, Continental filed a Notice of Intention to Drill a certain well identified as Continental Navajo B-8 well, at a location on lands covered by Navajo Tribal Lease No. 14-20-603-407 and as of this date the Supervisor has neither approved nor denied such notice. Sometime thereafter Phillips filed a Notice of Intention to Drill at a location on Navajo Tribal Lease No. 14-20-603-353, which location was within 36.3 feet of the north boundary of Continental Navajo Tribal Lease No. 14-20-

603-407, which well is identified as Phillips No. 10-A Desert. The drilling of the Phillips well was approved on or after July 3, 1958, by order of the Supervisor which provided that such approval was subject to communitization.

Long prior to the filing of either of the above mentioned notices to drill, Continental had requested Phillips and Aztec to agree to pooling the lands here involved pursuant to an eighty-acre spacing pattern which had theretofore been established by the drilling of other wells in the general area. Phillips refused to agree to such pooling and as a result Continental, on or about May, 1958, applied to the Utah Oil and Gas Conservation Commission for a forced pooling order. This application is now pending before such Commission.

WHEREFORE, Continental hereby:

1. Appeals from the Order of the Supervisor approving the drilling of Phillips No. 10-A Desert Well.
2. Appeals from the failure of the Supervisor to approve Continental's Notice of Intention to Drill the Continental Navajo B-8 Well.
3. Requests that the Commissioner direct suspension of the Order of the Supervisor with respect to the drilling of the Phillips No. 10-A Desert Well pending this appeal.
4. Requests that the Commissioner make a determination of the north boundary of Navajo Tribal Leases Nod. 14-20-603-407 and 14-20-603-409 under which Continental is the lessee, and the south boundary of Navajo Tribal Leases No'd. 14-20-603-353 and 14-20-603-355 under which Phillips and Aztec are the lessees.
5. Requests a hearing before the Commissioner upon the matters here involved.

Attached hereto and made a part hereof is a Statement of Facts and a Statement of Law upon which this appeal and request for determination is predicated.

Copies of this appeal and request for determination have, concurrently with the filing thereof, been furnished Phillips Petroleum Company, Aztec Oil & Gas Company and the Navajo Tribe of Indians.

Dated this 18th day of July, 1958.

Respectfully submitted,

A. T. Smith
F. E. Radloff
Attorneys for Continental
Oil Company

STATEMENT OF FACTS

Attached to the Appeal and Request for Determination of Lease Boundaries in the Matter of Navajo Tribal Leases, Serial Nos. 14-20-603-407 and 14-20-603-409.

Under date of October 13, 1953, approved December 10, 1953, the Navajo Tribe of Indians issued two separate leases for oil and gas to Continental Oil Company covering lands described as follows:

Indian Lease No. 14-20-603-407

Point of origin to which most of the unsurveyed portion of the following tract is referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.

Tract No. 88. Beginning at a point 73,293 feet west along the boundary between the States of Utah and Arizona and 63,360 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to

the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 87, 79, 89 and 97 respectively. Tract No. 88 when surveyed probably will be described as follows:

Sections 29, 30, 31 and 32 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

Indian Lease No. 14-20-603-409

Point of origin to which most of the unsurveyed portion of the following tract is referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.

Tract No. 97. Beginning at a point 62,733 feet west along the boundary between the States of Utah and Arizona and 63,360 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 96, 88, 98 and 106 respectively. Tract No. 97 when surveyed probably will be described as follows:

Sections 27, 28, 33 and 34 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

Under date of October 27, 1953, approved January 8, 1954, the Navajo Tribe of Indians issued two separate leases for oil and gas to one F. D. Jernigan covering lands described as follows:

Indian Lease No. 14-20-603-353

Point of origin to which most of the unsurveyed portion of the following tract is referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.

Tract No. 87. Beginning at a point 73,293 feet west along the boundary between the States of Utah and Arizona and 73,920 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 86, 78, 88 and 96 respectively. Tract No. 87 when surveyed probably will be described as follows:

Sections 17, 18, 19 and 20 of T. 41 S., R. 24 E., S.L.M. and containing a total of approximately 2560 acres.

Indian Lease No. 14-20-603-355

Point of origin to which most of the unsurveyed portion of the following tract is referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.

Tract No. 96. Beginning at a point 62,733 feet west along the boundary between the States of Utah and Arizona and 73,920 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to

the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 95, 87, 97 and 105 respectively. Tract No. 96 when surveyed probably will be described as follows:

Sections 15, 16, 21 and 22 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

The Jernigan leases were, under date of January 3, 1955, effective January 1, 1955, assigned to Aztec Oil & Gas Company and, thereafter, Aztec, under assignments dated September 27, 1956, and February 12, 1957, assigned, as to an undivided one-half interest, such leases to Phillips Petroleum Company.

With respect to survey, each of the above described leases, in paragraph No. 2 of the rider thereto attached, provide as follows:

"Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U. S. Geological Survey, P. O. Box 6721, Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat."

Some time after these leases were issued, the township within which the lands described in these leases lie and surrounding townships were surveyed by an official survey of the Bureau of Land Management, Department of

Interior, as to the exterior boundaries of the townships, and, also, as to the points on such exterior boundaries from which the section lines would probably run. The directions for the survey did not authorize the surveying of the section lines and such lines were not surveyed.

The section corners within the township boundaries have since been surveyed by private surveyors at the request and on behalf of various companies holding leases within the township area. Such surveys have not, however, received official departmental approval and do not represent official departmental surveys.

The lands covered by each of the two leases owned by Continental above described have been surveyed by a private surveyor and these surveys show that such leases include the south 624 feet of Sections 19, 20, 21 and 22, as such sections were surveyed by private and unofficial surveys.

On or about June 19, 1957, Phillips commenced drilling a well located in the SW-1/4 SE-1/4 of Section 22, as such section was privately surveyed, 510 feet NSL and 2,140 feet WEL. This well was completed as a producer. As soon as Continental satisfied itself regarding the location of this well it notified Phillips, on August 14, 1957, that such well was located on land under lease to Continental. Subsequently, Phillips drilled two other wells in Section 22, one of which was also located on lands covered by Continental's lease.

Continental filed with the Supervisor, on or about May 9, 1958, a Notice of Intention to Drill Continental Navajo B-8 in the SW-1/4 of Section 20, Township 41 South, Range 24 East, S.L.M. The Supervisor has never acted upon this Notice of Intention to Drill either by approving or denying the same. Thereafter, Continental received information that Phillips was about to file a Notice of Intention to Drill at a location within 160.3 feet of Continental's proposed location, and in order to protect its rights Continental filed with the Supervisor a protest against the approval of

any drilling within the 80-acre spacing unit comprising the W-1/2 SW-1/4 of said Section 20, or any other 80-acre tract described in such protest. Notwithstanding the filing of this protest, after Phillips had filed a Notice of Intention to Drill in the SW-1/4 SW-1/4 of Section 20, 660 feet from the south line and 660 feet from the west line of such section (which location is just 160.3 feet north of Continental's proposed location), identifying such well as Phillips' 10-A Desert well, the Supervisor approved the Phillips Notice of Intention to Drill on July 3, 1958, including in such approval a condition which appellant is informed and believes provides substantially as follows:

"As the well location is 36.3 feet north of lands claimed by Continental Oil Company to be included in their lease 14-20-603-407, drilling is approved subject to communitization of the applicable spacing unit for W-1/2SW-1/4 or SW-1/4SW-1/4 Section 20-41S-24E, if final adjudication results in diverse lease ownership in said unit. Said communitization shall be effective as of the date of this approval."

Continental is further informed and believes that notwithstanding the above recited situation Phillips is about to move in a rig and drill at the location shown in its Notice of Intention to Drill at said Phillips' 10-A Desert well.

In May of 1958 Continental filed an application before the Utah Oil and Gas Conservation Commission requesting forced pooling of the 80-acre tracts covered by the S-1/2 of Sections 19, 20, 21 and 22, Township 41 South, Range 24 East, as such sections had been established by private survey. At the present time all drilling in this area is being conducted on 80-acre drilling and spacing units pending final determinations by the Utah Conservation Commission.

A. T. Smith
General Attorney
Continental Oil Company

[Notarial Certificate dated July 18, 1958]

ARGUMENT

Attached to the Appeal and Request for Determination of Lease Boundaries in the Matter of Navajo Tribal Leases, Serial Nos. 14-20-603-407 and 14-20-603-409.

I.

THE LANDS COVERED BY CONTINENTAL'S LEASES ARE THE LANDS DESCRIBED IN THE LEASES BY METES AND BOUNDS.

A. In the absence of a clear expression of intention to the contrary, the metes and bounds description appearing in a conveyance is controlling.

The applicable general law is stated in 8 American Jurisprudence, Boundaries, Sec. 50, p. 782, as follows:

" . . . The general rule that in the construction of boundaries the intention of the parties is the controlling consideration is applied in determining the relative importance of conflicting elements of description. The various rules adopted by the court for construing and interpreting conflicts between calls of description all have for their primary purpose the ascertainment of the intention of the parties. Another basic consideration is that those particulars of the description which are uncertain and more liable to error and mistake must be governed by those which are more certain; that one should be retained and given efficacy which is the most certain and the least susceptible to mistake. In this regard, a particular is preferred over, and will control or limit, a general description, but where the particular description is in any degree obscure or uncertain, the general description may be resorted to for the purpose of establishing the identity of the premises, providing it is actually an independent description of the premises. In the case of inconsistent descriptions of land of equal cer-

tainty, the grantee is usually considered as being entitled to hold under the one which is most beneficial to him. . ."

The general rule of construction in these situations is set out in an annotation in 72 A.L.R. at page 410 which reads as follows:

"Where a particular and a general description in a deed conflict, and are repugnant to each other, the particular will prevail unless the intent of the parties is otherwise manifested on the face of the instrument."

For cases supporting this general rule see:

Perry v. Buswell, 94 A. 483 (Maine 1915);
Hale v. Swift, 63 S.W. 288 (Ky. 1901);
Booten v. Peterson, 209 P. 2d 349 (Wash. 1949).

The Director, Bureau of Land Management, Department of Interior, in interpreting a lease application, has recently held that a metes and bounds description is controlling over a "what will be when surveyed" description. C. S. McGhee, Federal Lease Utah 018343, March 12, 1958, Gower's Federal Service BLM-1958-55.

B. Where lands are a part of unsurveyed lands they can be conveyed only by a metes and bounds description.

The Federal Courts have held that a description by sections or subdivisions of sections, where the lands have not been officially surveyed, describes no particular land at all because the official survey does not ascertain boundaries but creates those boundaries.

Carroll v. United States, 154 F. 425 (Mont. 1907);
United States v. Montana L. & M. Company, 196
 U. S. 573 (1905);
United States v. State of Wyoming, 331 U.S. 440 (1947).

This is true even when the exterior boundaries of the town-

ship have been surveyed and marked at one mile intervals.
United States v. State of Wyoming, supra.

II.

PRIVATE SURVEYS SUCH AS MAY HAVE BEEN FILED UNDER THE CONTINENTAL OR PHILLIPS LEASES REFLECT NOTHING MORE THAN SURVEYS REQUIRED AS A CONDITION PRECEDENT TO DRILLING AND DO NOT AFFECT OR COULD BE INTENDED TO AFFECT THE DESCRIPTION OF THE LANDS COVERED BY THE LEASE.

Under paragraph No. 2 of the rider attached to the subject leases, the lessee is required to file a private survey of the leased lands as a condition precedent to drilling. The leases do not require an official survey or establishment of official sections or subdivisions of sections within townships. Such private surveys made as a condition precedent to drilling do not and could not change the interest conveyed by the leases. The area covered by the subject leases could have been developed without any official survey of townships and has, in fact, been developed without any official survey of sections or subdivisions of sections. For all purposes, the leased lands could and should be located by surveying out the metes and bounds descriptions contained in the leases which Continental has done. And this survey shows the lands covered by the leases include the south 624 feet of Sections 19, 20, 21 and 22 as privately surveyed.

III.

THE ORDER OF THE SUPERVISOR HERewith
APPEALED FROM VIOLATES THE REGULATIONS.

30 CFR 221.20(a) provides as follows:

"The lessee shall not drill any well within 200 feet of any of the outer boundaries of the leased lands except where necessary to protect those lands against wells on land the title to which is not held by the lessor, and then only on consent first had in

writing from the supervisor: Provided, That for good cause shown in any particular case, and where not prohibited by law, a lessee may be relieved of such restrictions on written consent of the supervisor. The lessee shall not drill any well within 200 feet of the boundary of any legal subdivision without first submitting adequate reasons therefor and obtaining consent in writing from the supervisor, such consent to be subject to such conditions as may be prescribed by said officials."

Since all of the lands here involved are by executive order a part of the Navajo Indian Reservation it cannot be claimed that a location only 36.3 feet from the boundary of the lease was necessary to protect those lands against wells on lands the title to which is not held by the lessor.

IV.

THE ORDER OF THE SUPERVISOR APPROVING PHILLIPS' NOTICE OF INTENTION TO DRILL 10-A DESERT WELL GOES BEYOND THE SCOPE OF THE AUTHORITY OF THE SUPERVISOR.

There is nothing in Title 25 of the United States Code Annotated, or any other statutory law, or in the regulations pertaining to Indian lands, that authorizes the Supervisor to approve a Notice of Intention to Drill subject to conditions requiring communitization, nor is there anything in Title 25 of the United States Code Annotated which authorizes the communitization of Indian leases. This raises a serious question as to the validity of the order that has been issued by the Supervisor, and, also, a serious question as to whether the order is enforceable. In this situation Continental is exposed to having Phillips drill a well pursuant to the order issued by the Supervisor and then refuse to comply with the condition regarding communitization. This is an inequitable and intolerable position in which to place Continental, particularly in view of the fact that after Phillips' well is drilled it is doubtful whether Continental, in view of the spacing pat-

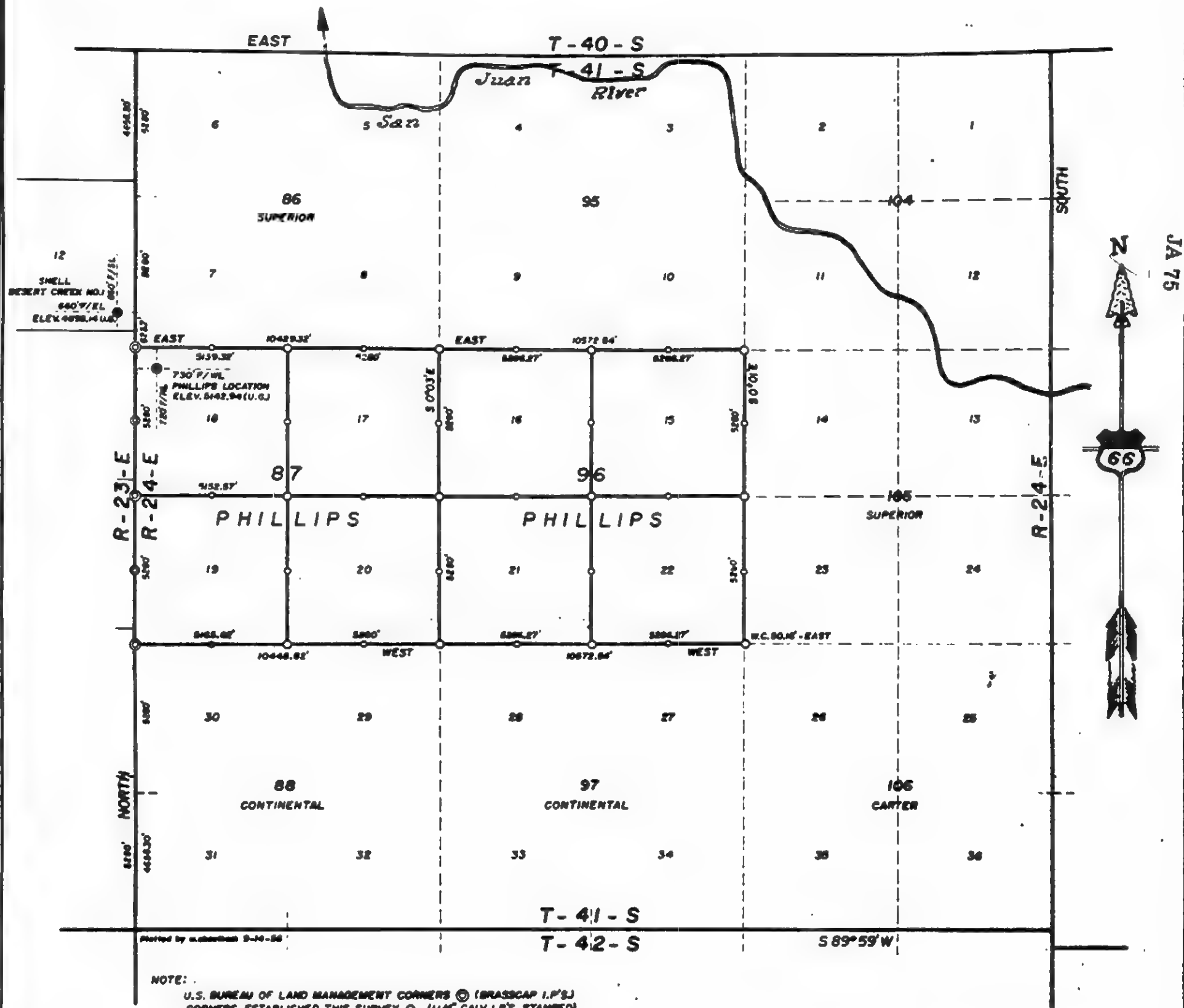
tern in the field, would be able to offset such well with a result that Continental's leases would be subject to drainage against which it would have no relief. Accordingly, it is absolutely essential that the Commissioner suspend the order of the Supervisor pending determination of the points raised in this appeal and request or, at the very minimum, until some substantial assurance is afforded Continental with respect to the protection of its leasehold interest and correlative rights.

CONCLUSION

In conclusion, Continental recognizes that orderly development in this area is desirable for the purposes of conservation and prevention of waste. For this reason Continental believes that its rights should be protected by pooling arrangements rather than any attempt to establish a system of offset wells. Any pooling to protect Continental must be by agreement with Phillips and Aztec, which agreement Phillips and Aztec have heretofore refused to enter upon.

It is also essential, in the interests of orderly development of oil and gas in the area under the Indian leases involved and in order to protect the rights of the parties, that the boundaries between the Continental and Phillips leases be determined.

Because of information which has come to Continental to the effect that Phillips is about to drill under the order of the Supervisor, it is essential that that order be at least temporarily suspended, and an immediate hearing before the Commissioner is requested to avoid irreparable damage which may follow from the action contemplated by Phillips.



NOTE:

U.S. BUREAU OF LAND MANAGEMENT CORNERS (BRASSCAP I.P.S.)
CORNERS ESTABLISHED THIS SURVEY (11/14 GALV. I.P.S. STAMPED)
SECTION AND 1/4 CORNERS MONUMENTED WITH SANDSTONE.

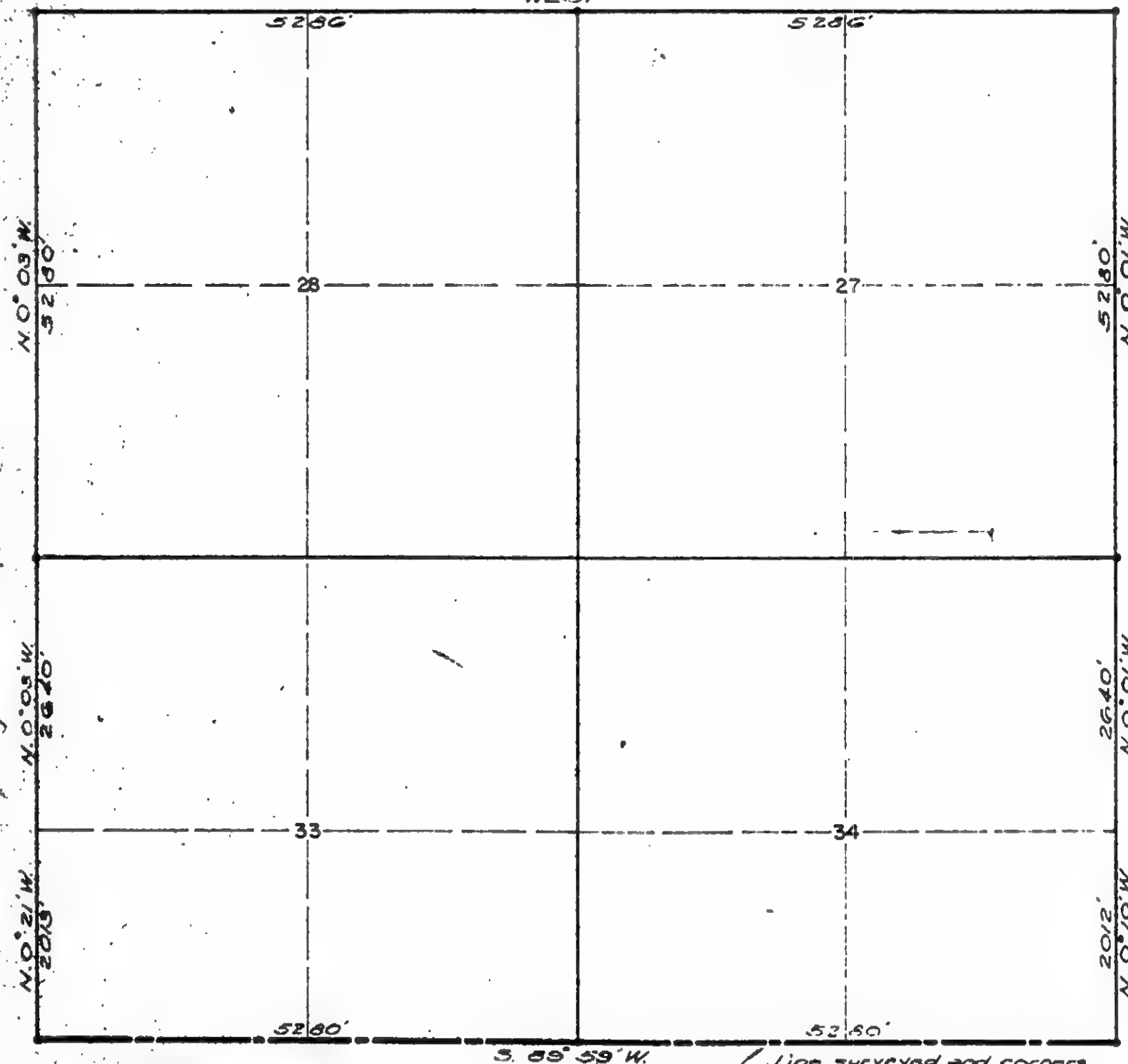
THIS IS TO CERTIFY THAT THE ABOVE PLAT WAS PREPARED
BY THE SURVEYOR IN ACCORDANCE WITH THE SURVEY MADE BY ME ON
THE 14TH DAY OF SEPTEMBER 1956 AT THE SAME TIME AND PLACE
AND THAT THE SURVEYOR IS A LICENSED SURVEYOR IN THE STATE OF UTAH.

Surveyed by: [Signature]
Date: Sept. 1956
San Juan Engineering Co.
Farmington, N.M.

**SURVEY OF TRACTS 87 AND 96
FOR
PHILLIPS PETROLEUM CO.
SECTIONS 15 TO 22 (INCL.) T-41-S R-24-E
SALT LAKE BASE MERIDIAN
NAVAJO INDIAN RESERVATION
SAN JUAN COUNTY UTAH
SCALE: 2 INS. = 1 MI.
SEPT. 1956
SAN JUAN ENGINEERING CO. FARMINGTON N.M.**

R. 24 E., S. L. M.

WEST



Line surveyed and corners
of U.S. Cadastral Survey,
Bureau of Land Management.



Ernest V. Echols, Jr.
Registered Land Surveyor



Section corners on this survey are
1 1/2" iron pipe with information stamped
on side of pipe.

Meridian on this survey determined
by both Pictis and Solar Observations.

This tract is surveyed according to courses and distances shown on the U.S.B.L.M. Plan of Survey, April 22, 1954.

CONTINENTAL OIL COMPANY

TRACT NO. 97

NAVAJO TRIBAL LEASE 14-20-603-409

CONTINENTAL OIL LEASE 70352

SAN JUAN CO., UTAH

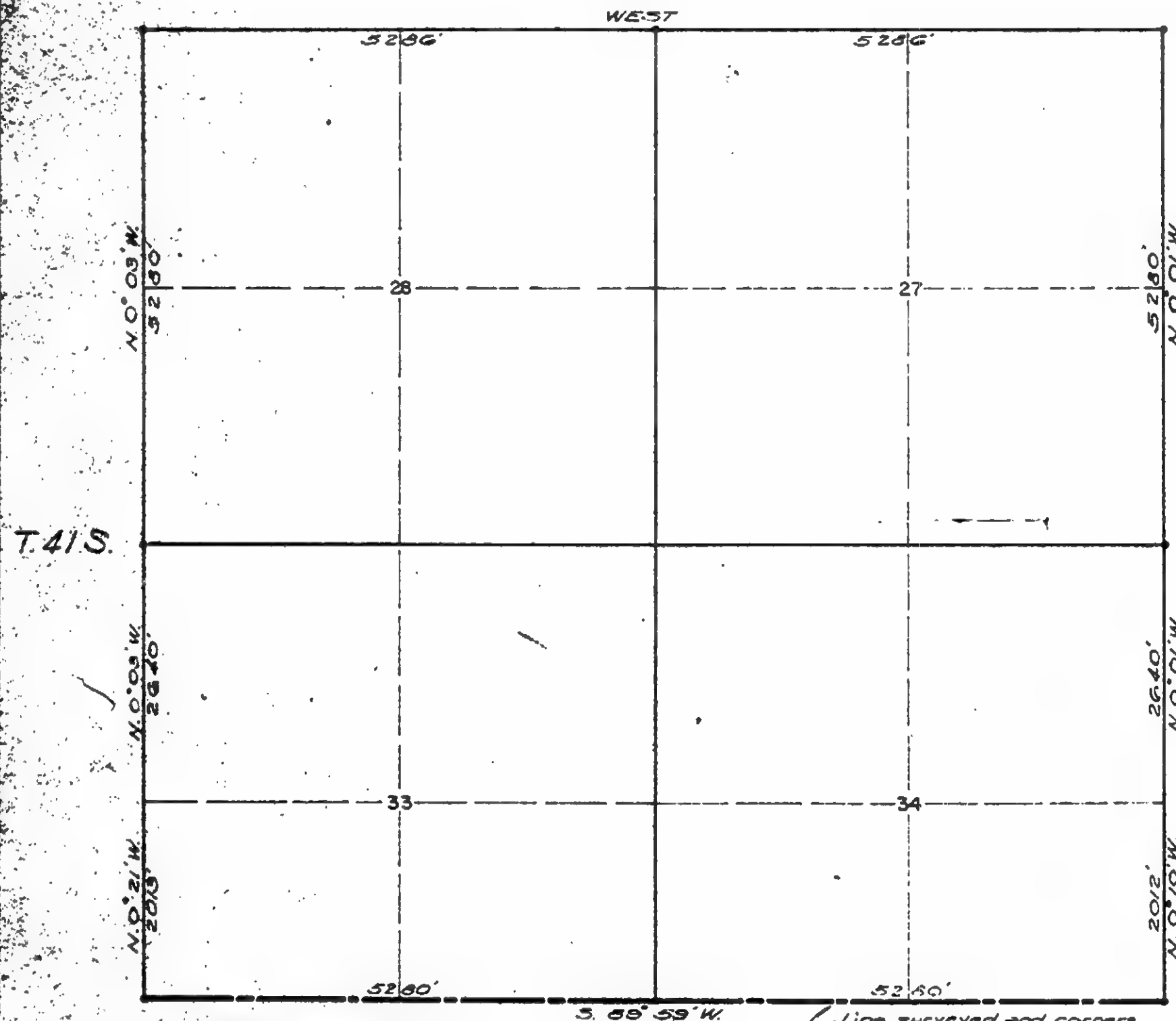
DECEMBER, 1956

SCALE, 4" = 1 MILE

DRWG. NO. 1

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R. 24 E., S. L. M.



Section corners on this survey are 1 1/2" iron pipe with information stamped on side of pipe.

Meridian on this survey determined by both Polaris and Solar Observations.

This tract is surveyed according to courses and distances shown on the U.S.B.L.M. Plan of Survey, April 22, 1954.



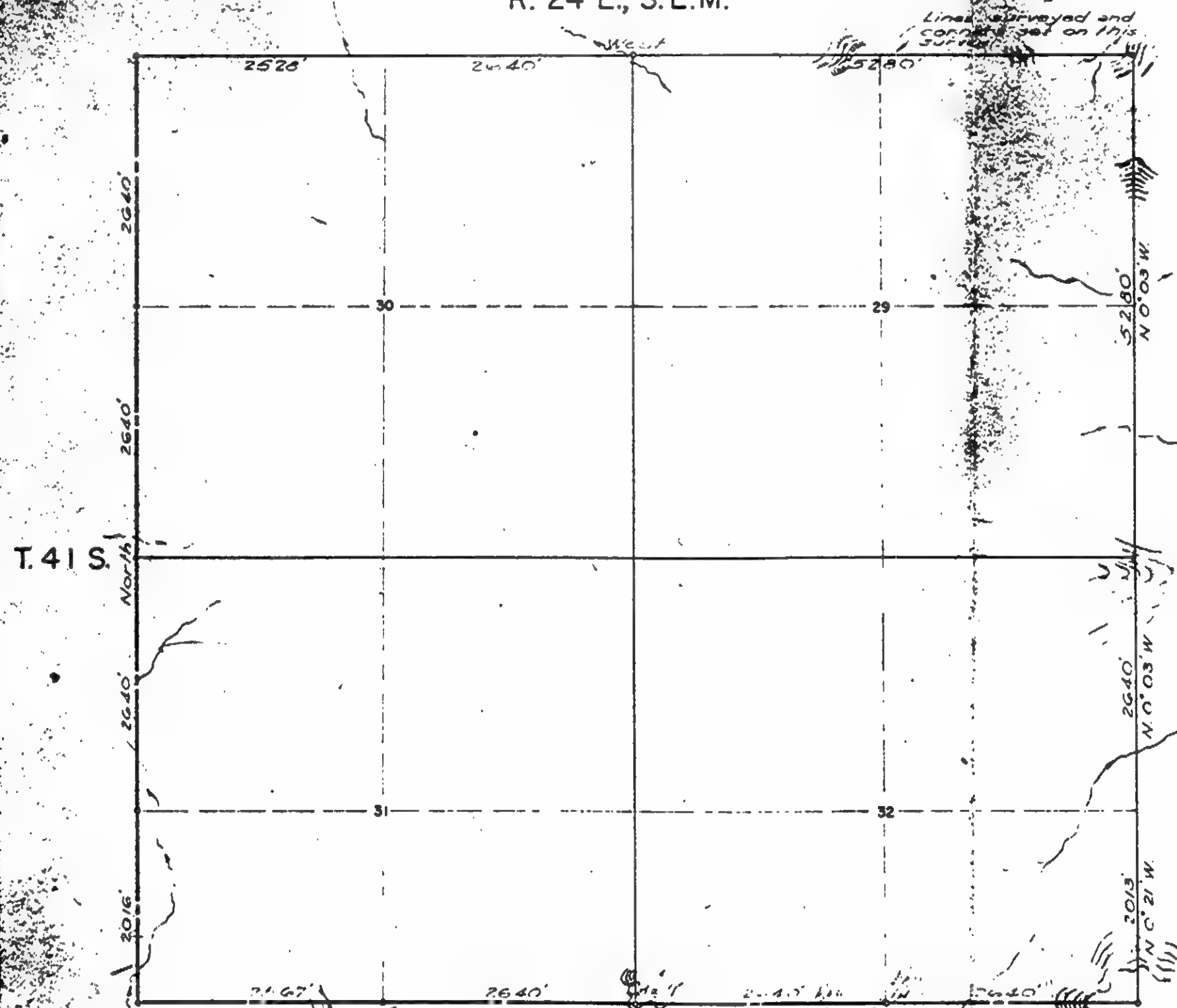
Ernest V. Echols
Ernest V. Echols
Registered Land Surveyor

Line surveyed and corners set by U.S. Cadastral Survey, Bureau of Land Management.

CONTINENTAL OIL COMPANY	
TRACT NO. 97	
NAVAJO TRIBAL LEASE 14-20-603-409	
CONTINENTAL OIL LEASE 70352	
SAN JUAN CO, UTAH	DECEMBER, 1956
SCALE, 4" = 1 MILE	DRWG. NO. 1

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R. 24 E., S.L.M.



T. 41 S.



Section corners set on this survey are 1/2" iron pipe with section information stamped on side of pipe.

True meridian on this survey was determined by Polaris and Solar observations.

Lines surveyed and corners set by U.S. Cadastral Survey, U.S. Bureau of Land Management, 1953.

Surveyed by

Ernest V. Echobawt

Ernest V. Echobawt
Registered Land Surveyor

CONTINENTAL OIL COMPANY

TRACT NO. 88

NAVAJO TRIBAL LEASE 14-20-603-407
CONTINENTAL OIL COMPANY LEASE 70350

SAN JUAN COUNTY,
UTAH

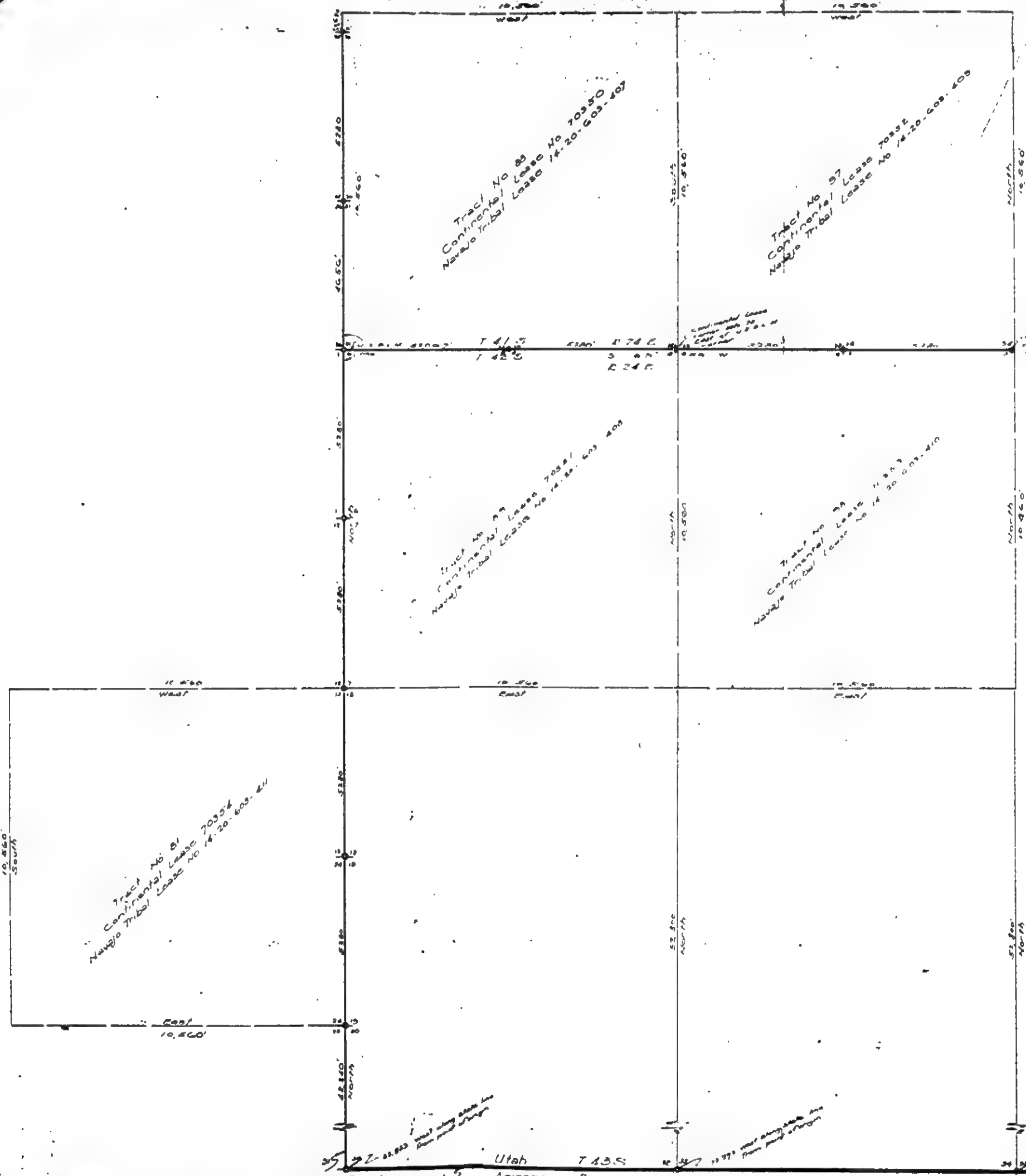
DECEMBER, 1956

SCALE, 4 = 1 MILE

R. 23 E. S. 1 M

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R. 24 E. S. 1 M



Tracts shown here are located in desert area with no oil or gas. Mining is the only activity in the area and is not a part of the Navajo Tribal Lease.



Continental Oil Company
San Juan Co. Utah

CONTINENTAL OIL COMPANY	
MAP SHOWING CONTINENTAL LEASES IN RELATION TO EXISTING U.S. B.L.M. SURVEY OF 1953	
SAN JUAN CO.	JULY, 1957
UTAH	3.1 MILE



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P. O. Box 6721
Roswell, New Mexico

Memorandum

June 4, 1958

To: General Superintendent, Navajo Indian Agency,
Window Rock, Arizona

Attention: Chief, Branch of Realty

From: Oil and Gas Supervisor, Roswell, New Mexico

Subject: Oil and gas lease conflict, White Mesa area,
Navajo Indian Reservation, southeastern Utah

Continental Oil Company is the lessee of Navajo Tribal Leases Nos. 14-20-603-407 and -409 covering secs. 29, 30, 31 and 32, T. 41 S., R. 24 E., S.L.M., and secs. 27, 28, 33 and 34, T. 41 S., R. 24 E., S.L.M., respectively. Aztec Oil and Gas Company and Phillips Petroleum Company are the co-lessees of Navajo Tribal Oil and Gas Leases Nos. 14-20-603-353 and -355 covering secs. 17, 18, 19 and 20, T. 41 S., R. 24 E., S.L.M., and secs. 15, 16, 21 and 22, T. 41 S., R. 24 E., S.L.M., respectively. Said leases were sold May 1, 1953 in Block B of Advertisement No. 41.

On May 9, 1958, Continental Oil Company filed with our Farmington District Office a Notice of Intention to Drill its well No. Navajo B-9 500' from the south line and 2097' from the east line of sec. 20, T. 41 S., R. 24 E. On the same date it filed an application to drill well No. Navajo B-8 500' from the south line and 660' from the west line of sec. 20, T. 41 S., R. 24 E. Both of said wells are on land included in Lease No. 14-20-603-353 according to survey plat filed by Phillips Petroleum and Aztec Oil and Gas, co-lessees.

On May 29, 1958, Phillips Petroleum Company and Aztec Oil and Gas Company filed with our Farmington District Office an application to drill a well 660' from the south line and 660' from the west line of sec. 20, T. 41

S., R. 24 E. Said location is on land included in Lease No. 14-20-603-353 according to the survey plat filed by Phillips Petroleum Company and Aztec Oil and Gas.

Continental Oil Company has filed with this office a survey plat showing the exterior boundaries of Leases Nos. 407 and 409 which conforms with the boundaries established for secs. 27 through 34, T. 41 S., R. 24 E., as surveyed by the Bureau of Land Management. Continental has also filed an amended plat covering said sections which does not conform with the survey as established by the Bureau of Land Management inasmuch as it places the northern boundary of Leases Nos. 407 and 409 623.7' north of the northern boundary of secs. 27, 28, 29 and 30 as established by the Bureau of Land Management survey. The survey plats filed by Phillips Petroleum and Aztec Oil and Gas for Leases Nos. 353 and 355 covering secs. 15 through 22, T. 41 S., R. 24 E., conform to the Bureau of Land Management survey for said sections.

The lands included in the leases under consideration are described by metes and bounds in the advertisement of sale and also in the lease instruments. Continental Oil Company claims that on the basis of such metes and bounds surveys, a strip of land 623.7' wide on the southern boundary of secs. 19, 20, 21 and 22 is actually included in its Leases Nos. 407 and 409 rather than in Phillips' and Aztec's Leases Nos. 353 and 355.

By letter dated May 29, 1958 to this office, Continental Oil Company has filed a formal protest against our approval of any wells proposed to be drilled by Phillips and Aztec in or near the disputed strip of land. Continental has also filed an application with the Oil Conservation Commission of the State of Utah asking for a forced pooling order involving sixteen 80-acre well spacing units in the s-1/2 secs. 19, 20, 21 and 22, alleging that Continental owns leases covering a portion of such well spacing units.

We have advised Phillips and Continental that we are deferring any action on their Notice of Intention to Drill until we have discussed with you and with the Gallup Area Office the dispute over lease boundaries and have obtained your opinion as to the proper ownership of the leases for the disputed area.

The disputed area involves lands that are undergoing active oil and gas development. Your opinion as to the ownership of the leases involved is requested as early as possible in order that oil and gas development will not be delayed.

JOHN A. ANDERSON

Copy to: Superintendent, Navajo Indian Agency
Area Director, Gallup (2)
Conservation Division, Washington
Farmington

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Navajo Agency
Window Rock, Arizona

July 3, 1958

Mr. John A. Anderson
Regional Oil and Gas Supervisor
U. S. Geological Survey
P. O. Box 6721
Roswell, New Mexico.

Dear Mr. Anderson:

This refers to your memorandum of June 4, 1958 relative to the dispute between Continental Oil Company, lessee of tribal oil and gas leases Nos. 14-20-603-407 and 409, and Phillips Petroleum Company and Aztec Oil & Gas

Company, co-lessees and tribal oil and gas lease numbers 14-20-603-353 and 355. The four leases are located in T. 41 S., R. 24 E., S.L.M., San Juan County, Utah, and were sold under tribal oil and gas lease advertisement No. 41, Block B, dated May 1, 1953.

At the time of the lease sale the lands involved were unsurveyed and were described by both metes and bounds and a probable legal subdivision description. The metes and bounds description was followed by "when surveyed, probably will be described as follows" (the appropriate section, township, range, and approximate acreage was designated and so written).

You call attention to the fact that the plats of survey furnished by Continental Oil Company for leases Nos. 407 and 409 in the first instance conformed with the boundaries established for Sections 27 through 34, T. 41 S., R. 24 E., S.L.M., as surveyed by the Bureau of Land Management. Later Continental filed an amended plat which did not conform with the survey. Phillips Petroleum Company and Aztec Oil & Gas Company have filed plats for leases Nos. 353 and 355 covering Sections 15 through 22, T. 41 S., R. 24 E., which conform with the Bureau of Land Management surveys for these sections.

It was the intent of this Agency and, we believe, of the Navajo Tribe that all leases in unsurveyed areas of Navajo Tribal lands would conform to the public land survey by section, township and range. This was the basis for offering such lands for lease, as required by regulation of the Department contained in Title 25, C.F.R., Part 171.8.

We therefore conclude that Continental Oil Company leases Nos. 14-20-603-407 and 409 cover Sections 27 through 34, T. 41 S., R. 24 E., S.L.M., and that co-lessees Phillips Petroleum Company and Aztec Oil and Gas Company leases Nos. 14-20-603-353 and 355 cover Sections 15 through 22, T. 41 S., R. 24 E., S.L.M., the exterior lines

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of which were surveyed by the Bureau of Land Management in 1953.

I concur:

Sincerely yours,

Chairman,
Navajo Tribal Council

G. Warren Spaulding
General Superintendent

Approved: JUL 8 1958

Acting Area Director

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
P. O. Box 6721
Roswell, New Mexico

July 25, 1958

Memorandum

To: General Superintendent, Navajo Indian Agency,
Window Rock, Arizona

From: Regional Oil and Gas Supervisor, Roswell, New
Mexico

Subject: Appeal of Continental Oil Company - Navajo
Tribal leases Nos. 14-20-603-407, 409, 353,
and 355

Transmitted herewith are two copies of an appeal dated July 18, 1958, by Continental Oil Company to the Commissioner of Indian Affairs from certain actions taken by the Regional Oil and Gas Supervisor of the Geological Survey, Roswell, New Mexico, in connection with certain oil and gas development on land included in Navajo Tribal leases No. 14-20-603-407 and 353.

There is attached a plat showing the lands included in the leases under consideration, and present and proposed

oil and gas development on such leases. Also attached is a thermofax copy of a memorandum dated June 4, 1958, from the Supervisor to the General Superintendent, Navajo Indian Agency, requesting a determination as to the lands covered by Navajo Tribal leases Nos. 14-20-603-407, 409, 353 and 355; and a thermofax copy of a letter dated July 3, 1958, from the General Superintendent, Navajo Indian Agency, to the Supervisor, giving the opinion concurred in by the Chairman of the Navajo Tribal Council, and approved by the Acting Area Director that leases Nos. 407 and 409 cover sections 27 through 34 and that leases Nos. 353 and 355 cover sections 15 through 22, all in T. 41 S., R. 24 E., S.L.M., the exterior lines of which were surveyed by the Bureau of Land Management in 1953.

The appeal covers five complaints and requests as follows:

1. Continental appeals from the action of the Supervisor in approving on July 3, 1958, a Notice of Intention to Drill filed by Phillips Petroleum Company and Aztec Oil and Gas Company covering well No. 10-A, 660 feet from the south line and 660 feet from the west line of sec. 20, T. 41 S., R. 24 E., subject to communitization of the proper spacing unit for such well if the lands in such spacing unit should be found to be in diverse lease ownership. Continental alleges, in Secs. III and IV of the Argument attached to the appeal, that the Supervisor's approval violates that provision of 30 CFR 221.20(a) relating to drilling a well within 200 feet of the outer boundaries of a lease and that approval conditioned on possible communitization of the well-spacing unit goes beyond the scope of the authority of the Supervisor, on the grounds that there is nothing in Title 25, Code of Federal Regulations, which authorizes the communitization of Indian leases.

The provisions of 30 CFR 221.20(a) were included in the Oil and Gas Operating Regulations effective June 1, 1942, in conformity with that provision of Sec. 16 of the Act of February 25, 1920, 41 stat 437, which prohibits

drilling on a public land lease within 200 feet of the outer boundaries except under certain conditions. Said provision of Sec. 16 was deleted in the Act of August 8, 1946. The Oil and Gas Supervisor may approve the drilling of a well closer than 200 feet from the outer boundaries of a lease without violation of the Oil and Gas Operating Regulations. The Act of May 11, 1938, 52 stat 347, authorizing the leasing of Indian Tribal lands for oil and gas, provides in Sec. 4.... "In the discretion of the said Secretary, and lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior to or subsequent to the issuance of such lease which involves the development or production of oil or gas from land covered by such lease." There are at this time under the supervision of the Roswell Regional Office eighty communitization agreements involving Southern Ute Tribal land and Navajo Tribal land. It appears, therefore, that communitization of lands included in Navajo Tribal oil and gas leases can be approved or prescribed.

2. Continental appeals from the failure of the Supervisor to approve its Notices of Intention to Drill well No. 8-B, 500 feet from the south line and 660 feet from the west line of sec. 20; and well No. 9-B, 500 feet from the south line and 2097 feet from the east line of sec. 20, on land allegedly in lease No. 407. As said locations are on land shown on plats submitted by Phillips and Aztec to be in lease No. 353, action on such notices was deferred by the Supervisor pending a determination by the Superintendent of the land included in the two leases. Upon receipt of such determination, the Supervisor by letter of July 10, 1958, returned the notices to Continental, unapproved, with the statement "... the General Superintendent of the Navajo Indian Agency advised this office that all of sec. 20, T. 41 S., R. 24 E., is included in lease No. 14-20-603-353, owned by Phillips Petroleum Company and Aztec Oil and Gas Company. In the circumstances, we are

unable to approve your notices to drill wells Nos. Navajo B-8 and B-9 in sec. 20."

3. Continental requests that the Commissioner direct suspension of the Supervisor's approval of the drilling of well No. 10-A by Phillips Petroleum Company. Phillips is now moving in rotary equipment to drill well No. 10-A, the actual location of which is on land in sec. 20 that Continental does not question as being included in lease No. 353. This office deferred approval of drilling well No. 10-A from May 29, 1958, to July 3, 1958, in order to obtain from the General Superintendent, Navajo Indian Agency, a determination of the boundaries of lease No. 353 and in recognition of Continental's protest of May 29, 1958, against the approval of drilling on any of the 80-acre well-spacing units in the S-1/2 sec. 20 as shown on the attached plat. In order to minimize advantage to one lessee over another, by possible drainage across lease lines, the Supervisor informally requested Continental to shut in wells Nos. 4-B and 5-B after initial production tests, until the lease boundaries were determined. Continental did not comply with such request and produced 16,000 barrels of oil from well No. 5-B from May 28 to July 1, and 3,000 barrels of oil from well No. 4-B from June 22 to July 1. Proper well-spacing and timely development of the W-1/2 SW-1/4 sec. 20 and protection of the interest owned by Phillips will be accomplished by the drilling of well No. 10-A at this time. We, therefore, believe that Phillips should be permitted to complete and produce the well in accordance with our approval given on July 3, 1958, which we believe protects any interest Continental may have in the spacing unit.

4. Continental requests that the Commissioner make a determination of the north boundary of leases Nos. 407 and 409 and the south boundary of leases Nos. 353 and 355. Continental apparently ignores the determination made by the General Superintendent, Navajo Indian Agency, on July 3, 1958, concurred in by the Chairman, Navajo Tribal Council, and approved by the Acting Area Director, Gallup

Area Office, establishing said boundary as the West-East section lines common to secs. 19, 20, 21 and 22, and secs. 27, 28, 29 and 30, T. 41 S., R. 24 E. Two copies of such determination were transmitted to Continental on July 10, 1958, by the Supervisor. The determination was made after full consideration of all of the facts of the case, including those presented by Continental in its Statement of Facts attached to the appeal. No objection appears to your further consideration of the matter if you believe it appropriate.

5. Continental requests a hearing before the Commissioner on the matters involved in the appeal. If you consider it appropriate, no objection appears to permitting Continental to present any additional information it may have to sustain its position in the case.

We agree with Continental that orderly development of the area by a uniform system of well-spacing is desirable and necessary for the purpose of conservation and prevention of waste. It is our opinion that development now in progress conforms with this objective.

JOHN A. ANDERSON

Copy to: Supt. (2)
Cons. Div., Wash.
Farmington
File (2)

JA 88

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Navajo Agency
Window Rock, Arizona

JUL 31 1958

Air Mail

Through: Area Director, Gallup

Commissioner, Bureau of Indian Affairs

Washington 25, D. C.

Dear Sir:

Enclosed herewith are the following documents in connection with the appeal of the Continental Oil Company - Navajo Tribal leases numbers 14-20-603-407, 409, 353 and 355.

1. [Carbon copy of] Memorandum of July 25, 1958 from the Supervisor to the General Superintendent.
2. Plat showing the lands included in the leases under consideration and present and proposed oil and gas development on such leases.
3. Thermofax copy of memorandum dated June 4, 1958 from the Supervisor to the General Superintendent.
4. Thermofax copy of a letter dated July 3, 1958 from the General Superintendent to the Supervisor.
5. Thermofax copy of a letter dated July 3, 1958 from U. S. G. S. District Engineer to Phillips Petroleum Company, approving "Notice of Intention to Drill", Well No. 10 Desert "A" subject to the Communitization of the applicable well spacing unit if final adjudication of the lease boundary dispute results in diverse lease ownership in said unit.

6. Copy of registered letter of July 18, 1958 from Continental Oil Company to the Supervisor, enclosing:

a. Appeal and request for determination of lease boundaries with respect to subject leases.

It is our thinking in the matter that Agency, Tribal and Area views were thoroughly expressed in our joint letter of July 3, 1958 to the Supervisor.

Since Continental feels it is desirable to appeal direct to your office relative to certain actions taken by the Supervisor, we agree with the view expressed and contained in the penultimate paragraph of the Supervisor's memorandum of July 25, 1958.

Sincerely yours,

G. Warren Spaulding
General Superintendent

Enclosure 410

Approved: JUL 31 1958

A. B. Wall
Acting Area Director

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington 25, D. C.

Registered Mail
Return Receipt Requested

Continental Oil Company
1755 Glenarm Street
Denver 2, Colorado

RECEIVED

OCT 31 1958

Gentleman:

LAND SECTION EXP. DEPT.
CONTINENTAL OIL COMPANY

We gave careful consideration to your Appeal and Request for Determination of Lease Boundaries of Navajo Tribal Oil and Gas Lease Nos. 14-20-603-407 and 14-20-603-409, dated July 18, as amended July 24, 1958, in which Continental Oil Company:

1. Appeals from the Order of the Supervisor approving the drilling of Phillips No. 10-A Desert Well.
2. Appeals from the Order of the Supervisor dated July 10, 1958, denying Continental's Notice of Intention to Drill the Continental Navajo B-8 well.
3. Requests that the Commissioner direct suspension of the Order of the Supervisor with respect to the drilling of the Phillips No. 10-A Desert Well pending this appeal.
4. Requests that the Commissioner make a determination of the north boundary of Navajo Tribal Leases No'd. 14-20-603-407 and 14-20-603-409 under which Continental is the lessee, and the south boundary of Navajo Tribal Leases No'd. 14-20-603-353 and 14-20-603-355 under which Phillips and Aztec are the lessees.
5. Requests a hearing before the Commissioner upon the matters here involved.

Because of the facts given below all parts of your Appeal and Request are denied except the request for a hearing before the Commissioner which has been withdrawn.

Consideration of the appeals depends on the determination of Continental's lease boundaries which affect also Phillips-Aztec's lease boundaries on the north and Superior Oil Company's lease boundaries further to the north. The boundary determinations will also have an effect on Carter Oil Company lease to the east and other leases on the Navajo Reservation and involves consideration of pertinent statements in the advertisement which were incorporated in the leases. The rider to each of the involved leases contains the following:

"Point of origin to which most of the unsurveyed portion of the following tract is referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner."

The metes and bounds description of each tract starts with the location of a beginning point by giving the distance west along the boundary between the states of Utah and Arizona and north of the point of origin and follows with distances around the perimeter of a tract made up of four standard sections. The description further states that the tract boundaries are common to tract boundaries on each of its four sides and lists the respective adjacent tracts. The description finally gives the sections by number, township, range, base meridian and approximate acres which will probably describe the tract when surveyed. The lease rider also contains the following conditions, taken from page 2 of lease sale advertisement:

"1. This land was offered on a tract basis and the bids were not on an acreage basis. The acreage

herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. No refund or additional payment of rental shall be required to be made because of a difference in the acreage stated and that shown by the survey. Neither shall such a difference in acreage be grounds for any adjustment of the bonus.

"2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U. S. Geological Survey, P. O. Box 6721, Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat."

The intent at the time the tracts were advertised for sale, was to make boundaries conform to the United States public land surveys as required by 25 CFR 186.8 (renumbered 25 CFR 171.8, December 24, 1957) which in part states: "The area covered by a lease - - - shall conform to the system of public land surveys - - -." This boundary requirement has been in effect for over 30 years. The last sentence of the first page of the lease sale Advertisement states: "Each lease will be issued to the highest responsible qualified bidder in accordance with the Act of May 11, 1938 (52 Stat. 347), and the regulations approved May 31, 1938, as amended or supplemented (25 CFR Part 186)", informed all bidders that the tracts would be

bounded by section lines where applicable as one of the requirements of the sale.

United States public land surveys divide large tracts of land into 6-mile square townships until state lines, standard parallels or guide meridians are reached. The townships on the sides closing against the previously established lines are generally smaller than standard size. Thus, some of the 36 sections into which a township is divided, must be smaller than the standard one-mile square section. Adjustment in the size of some sections must also be made for the convergence of meridians which are true north-south boundary lines. Requirement No. 1 of the rider to the leases, quoted above, was inserted because the fact, that some exterior sections of townships when surveyed have to be of varied size, was commonly known. The acreage of these closing sections as well as the metes and bounds description of the perimeter varies with the size of the sub-standard sections. For this reason, the metes and bounds description was used only to locate the unsurveyed lands as closely as possible until surveyed.

Township 41 South, Range 24 East, of the Salt Lake Meridian, was surveyed between August 7 and November 3, 1953. Section and quarter section corners on the perimeter were established although the interior section lines were not run. Continental's leases No. 14-20-603-407 and 409, shown as tracts 88 and 97 in block B of the advertisement, consisting of Sections 29, 30, 31 and 32 and Sections 27, 28, 33 and 34, respectively, of T 41 S, R 24 E, S.L.M., were approved on December 10, 1953. At that time, Continental Oil Company could easily have verified the intent to use the recently surveyed section corners along the township boundaries instead of the metes and bounds description for determining the tracts location and acreage, before well drilling was started.

In compliance with Requirement No. 2 of the rider quoted above, the south corners of the southerly sections of Continental's tracts should be shown to be at the south

section corners as starting points for the survey. The official survey of T 41 S, R 24 E, S.L.M., gives the west boundary of the south half of Section 31 as 30.55 chains (2016.30 feet) and the east boundary of the south half of Section 36 as 30.44 chains (2009.04 feet). These measurements when interpreted across the southerly sections show the north-south distance between the south half of Sections 31 and 32 to be 2015.09 feet; Sections 32 and 33 to be 2013.88 feet; Sections 33 and 34 to be 2012.67 feet; and Sections 34 and 35 to be 2011.46 feet. The official survey gives the south boundary of the west half of Section 31 as 38.89 chains (2566.74 feet) and the north boundary of the west half of Section 6 as 37.78 chains (2493.48 feet). The east-west distances between the west half of Sections 19 and 30 is 2542.32 feet and between Sections 30 and 31 is 2554.53 feet when interpolated between the north and south boundaries of the westerly half sections of the township. All other quarter section dimensions in the tracts are standard (40 chains or 2640 feet). The tracts when surveyed using the above measurements or averaged to the nearest foot as was done on the survey plats first submitted by Continental, will not conflict with tracts to the north held by Phillips-Aztec. Continental's amended plat on July, 1957 also shows that its west boundary does not coincide with the public land survey which will cause a conflict with the Carter Oil Company boundary and a disagreement as to well locations. In addition, when the tracts are located in accordance with the public land survey, Phillips No. 10-A Desert Well is located within proper distance of the boundary while the proposed Continental Navajo B-8 well is improperly located. In consideration of the above, Orders of the Supervisor approving drilling of Phillips No. 10-A Desert Well and disapproving drilling of Continental's Navajo B-8 well are upheld. The request that the Commissioner direct suspension of the Supervisor's orders with respect to drilling well is denied. The boundaries of the above leases are determined to be those of the appropriate U. S. Public Land Survey lines.

An appeal from the decision of the Commissioner of Indian Affairs may be taken to the Secretary of the Interior within 30 days after receipt of this letter. The appeal shall be accompanied by such written showing and argument on the facts and law as appellant may deem adequate to justify reversal or modification of the decision. Any statement of facts not submitted to the Commissioner must be made under oath.

Sincerely yours,

Commissioner

Contract No. 14-20-603-355

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

OIL AND GAS MINING LEASE—TRIBAL INDIAN LANDS

Navajo TRIBE, STATE OF Utah

THIS INDENTURE OF LEASE, made and entered into in sextuplicate this 27 day of October, 1953, by and between San Ahkeah, Chairman, Navajo Tribal Council of Window Rock, State of Arizona, for and on behalf of the Navajo Tribe of Indians, designated herein as lessor, and F. D. Jernigan, 4548 Belclaire Avenue of Dallas, State of Texas, herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of \$7,680.00, paid to the Treasury of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934,

receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of San Juan, State of Utah, and more particularly described as follows:

For land description see rider attached hereto.

containing 2,560 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer there after as oil and/or gas is produced in paying quantities from said land.

2. The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased.

3. In consideration of the foregoing, the lessee hereby agrees:

(a) Bond.—To furnish such bond as may be required by the regulations of the Secretary of the Interior, with satisfactory surety, or United States Bonds as surety therefor, conditioned upon compliance with the terms of this lease.

In witness whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to execution by lessor:

Sam Ahkeah [Seal]
Chairman, Navajo Tribal
Council

Elaine L. Harper
P.O. Window Rock, Arizona

M. D. Long
P.O. Window Rock, Arizona

Two witnesses to execution by lessee:

F. D. Jernigan [Seal]

Betty Gregory
P.O. Dallas, Texas

[Illegible]
P.O. Dallas, Texas

ACKNOWLEDGMENT OF LESSOR

State of Arizona)
County of Apache) ss:

Before me, a notary public, on this 27 day of Nov. 1953 personally appeared Sam Ahkeah to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

[Illegible]
Notary Public

My commission expires January 6, 1956

JA 98

UNITED STATES
DEPARTMENT OF THE INTERIOR
Window Rock, Arizona

JAN 8 1954

The within lease is hereby approved.

[Illegible]
Area Director

Filed for record this 17 day of Sept., 1926, at 9:10
o'clock a.m.

Book 140, Page 106-10
Paid 10.60

Arrilla E. Warren [?]
By IR.

Rental received, \$3,200.00

Rider to Tribal land Oil & Gas Lease Contract
No. 14-20-603-355, F. D. Jernigan, 4548 Bel-
claire Avenue, Dallas, Texas, lessee.

Point of origin to which most of the unsurveyed portion
of the following tract is referred and described is the com-
mon corner of the States of Utah, Colorado, New Mexico
and Arizona, which is marked by a General land Office
monument. Some tracts consisting of partially surveyed
and partially unsurveyed lands are described from a sur-
vey township corner.

Tract No. 96

Beginning at a point 62,733 feet west along the bound-
ary between the States of Utah and Arizona and 73,920 feet
north of point of origin, thence north 10,560 feet; thence
west 10,560 feet; thence south 10,560 feet; thence east
10,560 feet to the point of beginning; the north, west, south
and each boundaries of said tract being common to the
south, east, north and west boundaries of Tracts, 95, 87,
97 and 105 respectively. Tract No. 96 when surveyed
probably will be described as follows:

Sections 15, 16, 21 and 22 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres.

1. This land was offered on a tract basis and the bids were not on an acreage basis. The acreage herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. No refund or additional payment of rental shall be required to be made because of a difference in the acreage stated and that shown by the survey. Neither shall such a difference in acreage be grounds for any adjustment on the bonus.
2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U. S. Geological Survey, P. O. Box 6721, Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat.
3. If so required by the Indian Service, the lessee shall condition under the direction of the Supervisor of the U. S. Geological Survey, any wells drilled, which do not produce oil or gas in paying quantities as determined by said Supervisor, but which are capable of producing water satisfactory for domestic, agricultural or livestock use by the lessor. Adjustment of costs for conditioning of the well and for value of casing and equipment left in or on the well will be made in said cases where it is determined that the well will produce water satisfactorily as aforesaid.
4. Lessees shall employ Navajo labor in all positions

for which they are qualified, including truck drivers, and shall protect the Indian grazing rights and other Indian rights to the surface of the lands.

5. Subject to the preference provided for above, the lessee, assignee, or sub-lessee shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

Contract No. 14-20-603-353

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

OIL AND GAS MINING LEASE—TRIBAL INDIAN LANDS

Navajo TRIBE, STATE OF Utah

THIS INDENTURE OF LEASE, made and entered into in sextuplicate this 27 day of October, 1953, by and between Sam Ahkeah, Chairman, Navajo Tribal Council of Window Rock, State of Arizona, for and on behalf of the Navajo Tribe of Indians, designated herein as lessor, and F. D. Jernigan, 4548 Belclaire Avenue of Dallas, State of Texas, herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of \$7,680.00, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove,

and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of San Juan, State of Utah, and more particularly described as follows:

For land description see rider attached hereto.

containing 2,560 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

In Witness Whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to execution by lessor:

/s/ Eloise L. Harper	/s/ Sam Ahkeah
P.O.: Window Rock, Arizona	Chairman, Navajo Tribal
/s/ M. D. Long	Council [Seal]
P.O.: Window Rock, Arizona	

Two witnesses to execution by lessee:

/s/ Betty Gregory	/s/ F. D. Jernigan
P.O.: Dallas, Texas	[Seal]
/s/ [Illegible Signature]	
P.O.: Dallas, Texas	Attest: _____

ACKNOWLEDGMENT OF LESSOR

State of Arizona ss:
County of Apache

Before me, a notary public, on this 27th day of Nov., 1953, personally appeared to me known to be the identi-

cal person who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

[Illegible Signature]

Notary Public

My commission expires January 6, 1956.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Window Rock, Arizona

January 8, 1954

The within lease is hereby approved.

[Illegible Signature]

Area Director

Filed for record this 17th day of September, 1956, at 9:10 o'clock a.m. Book 140, Page 111-115. Paid 10.60.

Rental received, \$3,200.00

/s/ Arrilla E. Warren
Co. Recorder

Rider to Tribal Land Oil & Gas Lease Contract No. 14-20-603-353, F. D. Hernigan, 4548 Bel-claire Avenue, Dallas, Texas, Lessee.

Point of origin to which most of the unsurveyed portion of the following tract is referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.

Tract No. 87

Beginning at a point 73,293 feet west along the bound-

ary between the States of Utah and Arizona and 73,920 feet north of point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 86, 78, 88 and 96 respectively. Tract No. 87 when surveyed probably will be described as follows:

Section 17, 18, 19 and 20 of T. 41 S., R. 24 E., S.I.M., and containing a total of approximately 2560 acres.

* * *

December 12, 1958

STATEMENT OF FACTS

by

Minerals Sections, Branch of Realty
Bureau of Indian Affairs

Additional information obtained since the Commissioner's decision of October 27, 1958 was written shows Continental Oil Company as one of a group of oil companies requesting and paying for the public land survey of the area by the Bureau of Land Management. In addition, the proposed cadastral survey instructions and a map of the proposed plan of survey submitted to the oil companies for approval showed that the shortage in Range 24 East was placed in Township 41 South. The part of T. 41 S., R. 24 E. north and east of the San Juan River was previously surveyed. Continental projects these north-south shortages in the south tier of the quarter sections of the township to the northerly boundary of its tract by claiming the 300-acre strip.

The request was made because of variance in the Lease Sale Advertisement No. 41, dated March 24, 1953. The tracts were partly described by reference to public land

survey and partly by metes and bounds, which did not agree with public land survey and caused ambiguity in the descriptions.

To substantiate the above statements, the following is quoted from BLM Cadastral Surveying File - 386, Utah:

General Notes of Meeting of Oil Company Representatives (the Continental Oil Company was represented by William H. Carpenter, Division Land Superintendent, who was also elected to the committee to represent the entire group of oil company representatives) with Bureau of Land Management, June 25, 1953, contains the following paragraphs:

"There were two separate meetings, in the first of which Bureau of Land Management representatives and one representative of the Land Office of the Bureau of Indian Affairs were in attendance, and in the second, oil company representatives only were present. The following notes do not differentiate between items which transpired at either meeting."

* * *

"The oil representatives decided to accept Plan 1, which was to have the skeleton survey (township boundaries only). In the subsequent discussions regarding the plan, the question of the manner of subdivision of the townships following the boundary surveys was considered. Mr. Petersen pointed out that any private surveyor or company surveyors could locate wells and the lease tract boundaries within a township and that such procedure would be acceptable to the BLM. Furthermore, it was determined from the representative of the Navajo Council that any such procedure which was approved by the BLM would undoubtedly be acceptable to the Indian Council and to the U.S.G.S. However, Mr. Petersen further indicated that without having an official survey, covering at least the township boundaries, made by the BLM that no survey within the area

could be considered as adequate. It is apparent that this method will involve some additional cost by any oil company at the time they wish to locate a well, but it is obvious that such expenditures need only be made as they are required and in many cases there may be no need for further surveys within some townships."

* * *

"The group was assured by Mr. Petersen of the BLM that the survey would be made according to their desires as nearly as possible and still comply with the established BLM procedures. This would mean that the point of origin would be the Four Corners Monument and that the boundaries of all leases would be surveyed as nearly as feasible to the descriptions by which the leases have been purchased."

The facts are further illustrated by following paragraphs from a letter from the Regional Chief, Division of Cadastral Engineering, to the Chairman of the above referred to Navajo Indian Survey Committee", dated July 6, 1953:

"On July 3 there were forwarded to you two prints of a diagram prepared in this office and delineating, at a scale of two inches to a mile, the official land surveys on which will be based the proposed cadastral survey by the BLM on the Navajo Indian lands in Utah.

"Projected in red on one of the prints is a plan of extending the new surveys. It is based on three overriding demands: (1) to provide a plan that will satisfy the basic laws on surveys and the established procedures of the BLM that are based on them, for in the final analysis these criteria must be satisfied; (2) to provide maximum regularity so that future subdivisional surveys of section, tract or lease boundaries may not be a hopelessly involved undertaking; and (3), but by no means least in importance, to place the township lines so as to give substantial compliance with the

greatest number of the tract boundaries which are described in detail and delineated in the Navajo Lease Sale Pamphlet of March 24, 1953. (Oil and Gas Mining Lease Sale Advertisement No. 41.)

"Incidentally, we have discovered a number of discrepancies in the tract descriptions and generally they allow nothing for convergency, which must be considered in the survey of such a sizeable area as this.

"The following observations relate to the proposed plan as it appears on the print:

"'Frac' denotes fractional and wherever it appears the distances will not be full miles. It is expected that all other miles will be full length except where affected by convergency.

"The reason for an expected north-south shortage is because the official survey records show a length of the east boundary of T. 43 S., R. 26 E. that is 7.40 chains, or 488.4 feet, less than a full six miles. Evidently, this condition was not recognized when metes-and-bounds descriptions were assigned to the unsurveyed tracts. No doubt, other fractional distances will come to light when the retracements and surveys are made on the ground; they may be either long or short. Moreover, there will be fractional measurements on east and west lines caused by convergency. However, it is not now expected that there will be any material departures from regular distances other than those indicated.

* * *

"Obviously, these conditions cannot be ignored. They must be recognized and then handled in the most orderly fashion. To do otherwise would result in confronting anyone who later may subdivide the townships with an utterly discouraging situation to say the least.

"Therefore, I am convinced that the solution to provide essential regularity of survey and substantial

agreement with the lease descriptions, leaving no conflicts or hiatuses between them, will be found only in such a plan as is illustrated. It provides for the completion of the exteriors of the partially surveyed townships by projecting their boundaries from corners previously established, thus maintaining agreement with the lease description of each tract that contains lands on both sides of the river. There then will follow the survey of the remaining township boundary lines in the area, extending the work northward from the Arizona line and following the lease descriptions as closely as possible.

"From a surveyor's viewpoint alone, if no leases were involved, I would advocate the extension of all lines south to the Arizona line from the partially surveyed townships. However, it is realized that such a procedure would violate to some degree all tracts that are described in the pamphlet by reference to the Four-Corner monument. Accordingly, such a plan is not especially recommended under these circumstances."

* * *

"The second print that was forwarded to you on July 3 is for use in making thereon any projections desired in your examination of the situation."

The conditions given under the surveying instructions and shown on the attached plat were accepted by the various oil companies with the payment of their proportionate share of the cost. The following paragraphs are from the approved Special Instructions under Group 386, Utah, dated July 28, 1953:

"In the execution of field work under Group 386, Utah, the Chiefs of Field Parties are authorized and directed to make the required surveys hereinafter set out, and will be guided by the Manual of Surveying Instructions, the provisions of these special instructions, and such

additional instructions as may be issued pursuant to reports of complications developed during the progress of the field work.

"The work outlined herein, which is on the Navajo Indian Reservation, has been requested by various oil companies who have been given assurance by the Bureau of Indian Affairs that their bids for oil and gas leases in the area will be accepted in the near future. The purpose of the work is to provide official township boundary surveys to facilitate subsequent identification of individual leases on the ground."

* * *

"The diagram accompanying these instructions delineates in general the procedures to be followed. The plan is designed to satisfy BLM survey procedures and provide maximum compliance with the oil and gas leases as described in the sale offer by the Bureau of Indian Affairs. Tremendous values may be involved. Accordingly, the survey must not depart materially from the leases described. However, we are confronted with one substantial discrepancy at the start. It is unfortunate that whoever wrote the lease descriptions evidently was not aware of a shortage of some 7.40 chains in the record length of the east boundary of T. 43 S., R. 26 E., but instead considered the line to be a full six miles long. This creates a situation whereby there will be conflicts between many of the lease descriptions because some are described from lines and corners of the Page and Lentz surveys while others are controlled in position by measurements from the Four-Corner Monument. The procedures herein provided are designed to eliminate the conflicts. However, a limited number of the leases unavoidably will suffer a reduction in area while a few others will be shifted in position. These matters have been discussed fully with the chairman of the survey committee of the oil companies."

* * *

"The corner of Ts. 41 and 42 S., R. 24 E. is intended later to be placed on the W. boundary of T. 41 S., R. 25 E., 12 miles distant from the Utah-Arizona line and is expected to result in a fractional distance in the south half mile on the E. boundary of section 36, T. 41 S., R. 24 E."

* * *

"* * * Fractional measurements are to be placed in the S. half mile on the W. boundary of section 31, T. 42 S., R. 25 E. and in the most southerly half mile on the east boundary of T. 41 S., R. 24 E."

* * *

"In conferences with the chairman of the Navajo Indian Land Survey Committee it was agreed that errors of closure in this would should not exceed 1 in 2000. Requirements of work of such degree of accuracy are set forth in Section 234 of the Manual. Accuracy checks during the progress of the field work are obtainable from connections that are to be made to the triangulation stations in and nearby the area. Also, it may be advisable to double chain the major lines. The tremendous values that may be affected by these surveys must be kept in mind at all times."

A copy of the map accompanying the Special Instructions is attached on which is shown in pencil the tracts involved and in red the conflicting area.

Referring to the argument by Continental under Statement of Issue and numbered parts, the following is added:

The Commissioner's decision upholds the Regional Supervisor's determination of Continental's lease boundaries which was approved by the Superintendent and the Area Director, not a claim by Phillips to part of Continental's, as implied.

Paragraph 3(g) of the leases, which are written on standard form 5-157, November, 1947, states:

"To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases: Provided, That no regulation hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease."

25 CFR 171.8 states in part:

"Lands to be in compact body. The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land survey, * * ."

25 U.S.C. 176 states in part:

"Survey of reservation. Whenever it becomes necessary to survey any Indian or other reservation, or any lands, the same shall be surveyed under the direction and control of the General Land Office, (functions transferred to BLM) and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed. (R.S. sec. 2115.)"

Manual of Instructions for the Survey of Public Lands of the United States, 1947, Section 8 states in part:

"From the foregoing synopsis of congressional legislation it is evident —

* * *

"Fourth. That the center lines of a regular section are to be straight, running from the quarter-section corner on one boundary of the section to the corresponding corner on the opposite section line."

Section 137 states in part:

"Section lines are usually surveyed from south to north and from east to west, in order to place the excess or deficiency of measurement on the north and west sides of the townships. In cases where the west or the north boundary of a township is within limits as to alinement (sec. 162) to serve as a basis for rectan-

gular subdivision, and the opposite line is defective, the section lines may be run from the west or north when the procedure is approved by the appropriate administrative officer."

Section 155 states in part:

"As the remaining unsurveyed public lands are found to contain less and less extensive areas it becomes necessary to depart from the ideal procedure in order more directly to reach the areas authorized for survey."

Section 159 states:

"If any part or all of the boundaries of a township which is to be subdivided have been previously surveyed, and the regional or public survey office has reason to question the accuracy of any portion of such exteriors, or the condition of the corner monuments thereon, the fact will be stated in the written special instructions, and the engineer will be authorized and required, as a condition precedent to beginning the subdivisional survey of such township to retract such boundaries to verify the direction and length of lines and to identify the monuments of the prior survey, and to resurvey all or such portion of the boundaries as may be found necessary to accomplish the following purposes:

"(a) To reestablish missing corners, (b) to remonument dilapidated corners, (c) to determine the direction and length of all lines, (d) to furnish all data necessary for the computation of the areas of all fractional lots, and (e) to provide a basis for an improved plan of the subdivision of the township. (Definitions of retracement and resurvey, sec. 387)

"The retracements and resurveys as above will afford the data for a computation of the total coordinate latitude and departure of each and every previously established exterior corner, and a preliminary platting of

their positions, all referred to a selected origin such as the southeast corner of the township. These will then be the basis for the required studies under the sections to follow."

Section 162 states in part:

"In the administration of the surveying laws it has been necessary to establish a definite relation between rectangularity (square miles of 640 acres, or aliquot parts thereof), as contemplated by law, and the resulting unit of subdivision consequent upon the practical application of surveying theory to the marking out of the lines on the earth's surface, wherein the ideal section is allowed to give way to one which may be termed 'regular'. Such relation, as applied to the boundaries of a section, has been placed at the following limits:

* * *

(d) For position, the corresponding section corners upon the opposite boundaries of the township to be so located that they may be connected by true lines which will not deviate more than 21' from cardinal."

Section 225 states in part:

"* * * Preference should be given to extending all surveys from south to north and from east to west, but if a better control is available by reversing the procedure in one or both directions, thus resulting in a simpler and better survey in respect to minimizing the number of extra corners as well as fractional lots, such reversal of procedure is fully warranted."

43 U.S.C. 772 states in part:

"The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation,

he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement."

Tract 76 is not located in T. 41 S., R. 24 E. It lies partly in two other townships to the north and west. Tract 104 is located north and east of the disputed area in the township. Tract 95 is immediately north of Phillips-Aztec east tract. However, Tract 86 immediately north of Phillips-Aztec west tract is leased to Superior Oil Company. In addition, most of the north boundary and the part of the township northeast of the San Juan River was previously surveyed and subdivided.

Attached is a copy of Land Map, Navajo Indian Lands, Utah and Arizona, prepared by the Shell Oil Company which shows the leased and unleased tracts in the area.

Attachments: 2 maps

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington 25, D. C.

JAN -2 1959

Memorandum

To: Secretary of the Interior
From: Commissioner of Indian Affairs
Subject: Appeal of Commissioner's Decision regarding
Boundaries of Navajo Tribal Oil and Gas Lease
No. 14-20-603-407 and No. 14-20-603-409

For your consideration of the subject appeal, we attach the following:

1. Letter from Mr. Samuel W. McIntosh, Attorney, Continental Oil Company, dated November 26, with "Notice of Appeal by Continental Oil Company to Secretary of the Interior from Decision of Commissioner of Indian Affairs."
2. "Supplemental Statement and Affidavit of A. T. Smith, General Attorney, Continental Oil Company" to the above Notice of Appeal.
3. File No. 10727-58 which contains the Commissioner's decision by letter to Continental Oil Company, file Realty-Minerals 10969-58, 10727-58, dated November 27, 1958 and other pertinent papers.
4. File No. 5015-46 containing advertisement No. 41 and 41-A of Oil and Gas Mining Lease Sale on Navajo Tribal Lands.
5. File No. 4-54, Oil and Gas Mining Lease No. 14-20-603-407 to Continental Oil Company.
6. File No. 6-54-Oil and Gas Mining Lease No. 14-20-603-409 to Continental Oil Company.
7. File No. 980-54, Oil and Gas Mining Lease No. 14-20-603-353 to F. D. Jernigan, now assigned to Phillips Petroleum Company and Aztec Oil and Gas Company.
8. File No. 982-54, Oil and Gas Mining Lease No. 14-20-603-355 to F. D. Jernigan, now assigned to Phillips Petroleum Company and Aztec Oil and Gas Company.
9. Statement of Facts by Bureau of Indian Affairs indicating Continental's acceptance of the tracts as described by public land survey.

Phillips Petroleum and Aztec Oil and Gas Companies have submitted their views on the appeal to the Commissioner although they were not required to submit statements or arguments. The letters are in file 10727-58 re-

ferred to above. If they should submit a further opinion or statement, it will be forwarded immediately.

Because of the high amounts paid for the leases and the drilling and well producing activity in the field, prompt consideration of the appeal will be appreciated. Please request from us any additional information that may be desired.

Fred H. Massey
Acting Deputy Commissioner

Attachments

Realty-Minerals

15481-58

10969-58

10727-58

File Copy Surname:

Wyner
Caldwell
Cannuts
Crow
Utz

January 26, 1959

Mr. W. Wade Head
Area Director, Gallup, New Mexico

Dear Mr. Head:

We are enclosing a copy of letter of transmittal, "Notice of Appeal by Continental Oil Company to Secretary of Interior from Decision of the Commissioner of Indian Affairs" and "Supplementary Statement and Affidavit of A. T. Smith, General Attorney, Continental Oil Company." The controversy is over the determination of boun-

daries of Continental Oil Company Navajo Oil and Gas Mining Leases No. 14-20-603-407 and No. 14-20-603-409.

Special Instructions, dated July 28, 1953, under Group 386, Utah, for the completion of the survey of some township boundaries and the survey of other township boundaries covering tracts offered for lease in Oil and Gas Lease Sale Advertisement No. 41 and supporting papers state that the survey was requested and paid for by the various oil companies leasing in the area. The Bureau of Land Management file shows that the "Navajo Indian Land Survey Committee" was set up, with Mr. H. F. Peterson of Shell Oil Company as chairman. Mr. William H. Carpenter of Continental Oil Company was also elected to the committee. Mr. Jernigan's interest was represented by the Southern Union Gas Company. The preliminary meeting of the oil company representatives on June 25, 1953, was also attended by Mr. M. D. Long, Bureau of Indian Affairs, Window Rock.

Before the survey was approved, the Special Instructions and prints of a diagram delineating the official land survey at a scale of 2" to a mile were submitted to the oil companies for any suggestions that they could make for better adjusting the survey to the descriptions of the leased tract boundaries. The diagram clearly showed in T. 41 S., R. 24 E., as well as others, that the north-south dimension of the most southerly tier of half sections would be less than standard. The part of the township north and east of the San Juan River was previously surveyed, including internal lines which necessitated reversal of the usual surveying procedure. The file does not show any objection by Continental, although the size of their leased tracts would be reduced by the lesser acreage in the sub-standard sections.

The interested oil companies approved the survey as outlined when they advanced their proportionate share of the estimated cost of the survey, but the Bureau of Land

Management files do not contain the signed agreements. The original supporting papers probably remained with the Navajo Indian Land Survey Committee files, which may have been turned over to the Shell Oil Company.

As it would greatly support our contention in the case, please try to obtain and send us copies of the oil company's signed agreements to the survey from either your, the Navajo Agency, or the former survey committee files.

Sincerely yours,

/s/ W. B. Greenwood
Acting Commission

Enclosures

cc: Regional Oil and Gas Supervisor, U.S.G.S.
P.O. Box 6721, Roswell, New Mexico
w/copies of enclosures

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Gallup Area Office
P.O. Box 1260
Gallup, New Mexico

Air Mail

February 25, 1959

Commissioner, Bureau of Indian Affairs
Washington 25, D.C.

Attention: Branch of Realty

Dear Sir:

Reference is made to your letter of January 26, 1959, File: Realty-Minerals, 15481-58, 10969-58, 10727-58, concerning a "Notice of Appeal by Continental Oil Company to Secretary of Interior from Decision of the Commissioner of Indian Affairs" pertaining to Navajo Oil and Gas Mining Leases Nos. 14-20-603-407 and 409.

There is enclosed a thermofax copy of a letter, dated February 12, 1959, from Mr. Leo M. Petersen, Area Cadastral Engineer, Bureau of Land Management, Salt Lake City, Utah, addressed to Mr. Richard C. Clark, Branch of Realty, Navajo Agency. There is also enclosed a thermofax copy of a letter, dated February 20, 1959, from the Acting General Superintendent, Navajo Agency, to the Area Director. As revealed by the enclosures the records of the Navajo Agency, Shell Oil Company, and Bureau of Land Management do not contain any signed agreements to the survey.

Sincerely yours,

[Illegible Signature]
Acting Assistant Area
Director

Enclosures

JA 119

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Navajo Agency
Window Rock, Arizona

Realty

February 20, 1959

Memorandum

To: Area Director
From: General Superintendent
Subject: Appeal by Continental Oil Company and Central Office letter of January 26, 1959

With reference to the above subject the Central Office by their letter referred to above, requested the Area Director to obtain the oil company's signed agreements to survey certain township boundaries covering tracts offered for lease in Oil and Gas Lease Sale Advertisement No. 41. The surveys to be made by the Bureau of Land Management and paid for by various oil companies leasing in the area.

Our files and records indicate that Continental Oil Company paid their proportionate cost of survey in the amount of \$1842.12. Our records, Shell Oil Company and Bureau of Land Management records do not contain any signed agreements to the survey.

A thermofax copy of Bureau of Land Management letter, dated February 12, 1959, relative to the above subject is attached for your information and submission to the Central Office.

/s/ K. W. Dixon
Acting General Superintendent

Attachment

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Area 2
Post Office Box No. 659
Salt Lake City 10, Utah

February 12, 1959

Mr. Richard C. Clark
Branch of Realty
Bureau of Indian Affairs
Navajo Agency
Window Rock, Arizona

Dear Mr. Clark:

This is in reply to your request on the telephone this date regarding the survey made by the Bureau of Land Management in 1953 on the Navajo Indian Reservation in southeastern Utah. As you know, the money for the survey was provided by a number of oil companies of which Continental Oil Company was one. However, it is our opinion that although the oil companies furnished the money, there was no agreement or agreements prior to commencing the work that any of the participants would be bound to adjudicate their leases to our survey. Mr. Al Meeker in the Salt Lake City office of the Shell Oil Company is of the same opinion.

Very truly yours,

Leo M. Peterson
Area Cadastral Engineer

/s/ Wayne Forrest
Acting

PLAINTIFF'S EXHIBIT 1

Contract No. I-149-Ind-8829 [Bureau of Indian Affairs,
Received June 11, 1951]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

OIL AND GAS MINING LEASE —
TRIBAL INDIAN LANDS

Navajo Tribe, State of Arizona.

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 25th day of May, 1951, by and between Walter O. Olson, Acting Area Director of Window Rock, State of Arizona, for and on behalf of the Navajo Tribe of Indians, designated herein as lessor, and W. J. Weaver, Continental Life Building, of Fort Worth, State of Texas, herein designated as lessee:

WITNESSETH:

1. Lessor, in consideration of a cash bonus of \$143,294.40, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of Coconino, State of Arizona, and more particularly described as follows:

For description, see rider attached.

containing 4,320 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

* * *

Rider to Tribal Land Oil & Gas Mining Lease
Contract No. I-149-Ind-8829, W. J. Weaver,
Lessee.

(a) COW SPRINGS AREA, COCONINO COUNTY, ARIZONA

Description of Tracts:

The point of origin to which all tracts are referred and hereinafter described, is 7.9 miles north of the point where the Inscription House Road leaves the main graded road from Tuba City to Bryant. This Point of Origin is marked by a capped 1-1/2 inch iron pipe protruding 18 inches above the ground, not in concrete, 141 foot west of the center line of the graded dirt road to Inscription House Trading Post. This iron pipe is the western most of three such pipes set along the 36° 30' Parallel of Latitude by observations on Polaris.

Tract No. 1.

Beginning at a point 2,640 feet East of the Point of Origin described above, thence East 15,840 feet; thence North 11,880 feet; thence West 15,840 feet; thence South 11,880 feet to the Point of Beginning, and containing 4,320 acres more or less (unsurveyed).

(b) The lessee shall complete the drilling of a well within five years after approval of the lease to thoroughly test the Pennsylvanian formation, or unless at a les-

ser depth oil or gas shall be discovered which can be produced in paying quantities or the lessee shall at any time establish to the satisfaction of the Oil and Gas Supervisor that further drilling of said well would be unwarranted or impracticable, provided, however, that the lessee shall not in any event be required to drill to a depth in excess of 5,500 feet. In the absence of the completion of drilling of such test well within the time allowed, the lease will be subject to cancellation.

(c) If so required by the Indian Service, the lessee shall condition under the direction of the Supervisor of the U.S. Geological Survey, any wells drilled, which do not produce oil or gas in paying quantities as determined by the said Supervisor, but are capable of producing water satisfactory for domestic, agricultural or live-stock use by the lessors. Adjustment of costs for conditioning of the well and for value of casing and equipment left in or on the well will be made in said cases where it is determined that the well will produce water satisfactorily as aforesaid.

(d) The lessee shall employ Navajo labor in all positions for which they are qualified, including truck drivers, and shall protect the Indian grazing rights and other Indian rights to the surface of the lands.

(e) The lessee shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and shall require an identical provision to be included in all sub-contracts hereunder.

/s/ W.O.W.

* * *

In Witness Whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to execution by Lessor:

/s/ M. D. Long	/s/ Walter Dillon	
P.O.: Window Rock, Arizona	Area Director	
/s/ Ruby Foster		[Seal]
P.O.: Window Rock, Arizona		

Two witnesses to execution by lessee:

/s/ B. H. Vickey	/s/ W. J. Weaver	
P.O.: Box 2035		[Seal]
Wichita Falls, Texas		
/s/ E. Sykes,		
P.O.: 1105 Continental		
Life Building, Ft. Worth, Texas.		

ACKNOWLEDGMENT OF LESSOR

State of Arizona ss:
County of Apache

Before me, a notary public, on this 4th day of June, 1951, personally appeared Walter O. Olson, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

My commission expires February 29, 1952.

/s/ Adele Samuelson
Notary Public in and for the
County of Pima, State of Ariz.

UNITED STATES
DEPARTMENT OF THE INTERIOR

The within lease is hereby approved.

Department of the Interior
Bureau of Indian Affairs
Washington 25, D.C.
Approved: July 12, 1946

CANCELLED effective July 12, 1956.

/s/ Walter O. Olson
Assistant Area Director

Rental received, \$5,400.00

/s/ D. L. Myer
Commissioner of Indian Affairs

PLAINTIFF'S EXHIBIT 2

Contract No. I-149-Ind.-8830

[Bureau of Indian Affairs,
Received June 11, 1951]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of Indian Affairs

OIL AND GAS MINING LEASE --
TRIBAL INDIAN LANDS

Navajo Tribe, State of Arizona.

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 25th day of May, 1951, by and between Walter O. Olson, Acting Area Director of Window Rock, State of Arizona, for and on behalf of the Navajo Tribe of Indians, designated herein as lessor, and

W. J. Weaver, Continental Life Building, of Fort Worth, State of Texas, herein designated as lessee:

WITNESSETH,

1. Lessor, in consideration of a cash bonus of \$225,374.40, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, do does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of Coconino, State of Arizona, and more particularly described as follows: For description, see rider attached.

containing 4,320 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

* * *

Rider to Tribal Land Oil & Gas Mining Lease Contract No. I-149-Ind-8830, W. J. Weaver, Lessee.

Tract No. 2.

Beginning at a point 2,640 feet East and 11,880 feet North of the Point of Origin: thence East 15,840 feet along a line coincident with the North line of Tract No. 1; thence North 11,880 feet; then West 15,840 feet; thence

South 11,830 feet to the Point of Beginning, and containing 4,320 acres more or less (unsurveyed).

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to execution by lessor:

/s/ M. D. Long	/s/ Walter Olson
P.O.: Window Rock, Arizona	Acting Area Director
/s/ Ruby Foster	[Seal]
P.O.: Window Rock, Arizona	_____ [Seal]

Two witnesses to execution by lessee:

/s/ B. W. Vickery
P.O.: Box 2035
Wichita Falls, Texas

/s/ E. Sykes,
P.O.: 1105 Continental

Life Bldg., Ft. Worth, Tex. Attest: _____

ACKNOWLEDGMENT OF LESSOR

State of Arizona ss:
County of Apache

Before me, a notary public, on this 4th day of June, 1951, personally appeared Walter O. Olson, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

My commission expires February 29, 1952.

/s/ Adele Samuelson
Notary Public in and for the
County of Pima, State of
Arizona.

UNITED STATES
DEPARTMENT OF THE INTERIOR

The within lease is hereby approved.

CANCELLED effective July 18, 1956.

/s/ T. H. Gordon
Assistant Area Director

Filed for record this _____ day of _____ 19__.

Department of the Interior
Bureau of Indian Affairs
Washington 25, D.C.
Approved: July 18, 1951

/s/ E. J. Utz
Commissioner of Indian Affairs

Rental received: \$5,400.00.

PLAINTIFF'S EXHIBIT 3

Contract No. I-149-Ind-8831

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of Indian Affairs

OIL AND GAS MINING LEASE —
TRIBAL INDIAN LANDS

Navajo Tribe, State of Arizona.

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this _____ day of _____, 19__, by and between Area Director of Window Rock, State of Arizona, for and on behalf of the Navajo Tribe of Indians, designated herein as lessor, and Sinclair Oil & Gas Company, Tulsa, Oklahoma; Skelly Oil Company, Tulsa,

Oklahoma; and Phillips Petroleum Company, Bartlesville, Oklahoma; of _____, State of _____, herein designated as _____ lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of \$162,700.80, paid to the Treasurer of said Tribe where the tribe is organized under the Act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of Coconino, State of Arizona, and more particularly described as follows: For description, see rider attached.

containing 3,840 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

* * *

Rider to Tribal land Oil & Gas Mining Lease
Contract No. 8831, Sinclair Oil & Gas Com-
pany, Skelly Oil Company, and Phillips Petro-
leum Company.

Tract No. 3.

Beginning at a point 23,760 feet North of the Point of
Origin; thence East 15,840 feet along a line which, ex-
cept for the Western most 2,640 feet, is coincident with
the North line of Tract No. 2; thence North 5,280 feet;
thence West 2,640 feet; thence North 5,280 feet; thence
West 15,840 feet; thence South 5,280 feet; thence East
2,640 feet; thence South 5,280 feet to the Point of Begin-
ning, and containing 3,840 acres more or less (unsur-
veyed).

* * *

In Witness Whereof, the said parties have hereunto
subscribed their names and affixed their seals on the
day and year first above mentioned:

Two witnesses to execution by lessor:

/s/ M. D. Long	/s/ R. G. Fister
P.O.: Window Rock, Arizona	Acting Area Director
	[Seal]
/s/ Ruby Foster	
P.O.: Window Rock, Arizona	_____
	[Seal]

Two witnesses to execution by lessee:

/s/ Betty Jo Lanney	Sinclair Oil & Gas Company
P.O. 47808 So. 53rd	/s/ T. H. Hammett
Tulsa, Oklahoma	Vice President
	[Seal]
/s/ Owen D. Knott,	
P.O. 926 So. Darlington	
Tulsa, 12, Oklahoma	Attest: V. C. Bash,
	Secretary

ACKNOWLEDGMENT OF LESSOR

State of Arizona ss:
County of Apache

Before me, a notary public, on this 21 day of June, 1951, personally appeared R. G. Fister, Acting Area Director, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

My commission expires February 29, 1952.

/s/ Adele Samuelson
Notary Public in and for the County of Pima, State of Arizona.

UNITED STATES
DEPARTMENT OF THE INTERIOR

Washington, D.C. _____, 19__.

The within lease is hereby approved.

Lease Canceled. Date: September 1, 1954

/s/ R. D. Holtz
Assistant Area Director

Filed for record this _____ day of _____, 19__.

Department of the Interior
Bureau of Indian Affairs
Washington 25, D.C.
Approved: July 18, 1951

/s/ D. J. Myer
Commissioner of Indian Affairs

Rental received, \$4,800.00

Two Witnesses to Execution by Lessee:

/s/ John R. Hudman Skelly Oil Company
P.O.: Tulsa, Oklahoma /s/ A. L. Cashman
/s/ Marion F. Wall Vice President
P.O.: Tulsa, Oklahoma

Attest: [Illegible]
Secretary

Two Witnesses to Execution by Lessee:

/s/ V. N. Stone Phillips Petroleum
P.O.: Bartlesville, Oklahoma Company
/s/ P. K. Clayton /s/ F. O. Stein
P.O.: Bartlesville, Oklahoma Vice President

Attest: /s/ R. E. Arnold
Asst. Secretary

PLAINTIFF'S EXHIBIT 4

Contract No. I-149-Ind-8832 [Bureau of Indian Affairs,
Received July 5, 1951]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of Indian Affairs

OIL AND GAS MINING LEASE —
TRIBAL INDIAN LANDS

Navajo Tribe, State of Arizona.

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 25th day of May, 1951, by and between R. G. Fister, Acting Area Director of Window Rock, State of Arizona, on behalf of the Navajo Tribe of Indians, designated herein as lessor, and Sinclair Oil & Gas Company, Tulsa, Oklahoma; Skelly Oil Company, Tulsa, Oklahoma; and Phillips Petroleum Company, Bartlesville, Oklahoma; herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of \$100,384.00, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of Coconino, State of Arizona, and more particularly described as follows: For description, see rider attached.

containing 3,200 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

* * *

Rider to Tribal Land Oil & Gas Mining Lease
Contract No. 8832, Sinclair Oil & Gas Company,
Skelly Oil Company, and Phillips Petroleum
Company.

Tract No. 4.

Beginning at a point 2,640 feet West and 34,320 feet North of the Point of Origin: thence East 15,840 feet along a line coincident with the North line of Tract 3; thence North 2,640 feet; thence West 2,640 feet; thence North 5,280 feet; thence West 2,640 feet; thence North 2,640 feet; thence West 10,560 feet; thence South 10,560 feet to the Point of Beginning and containing 3,200 acres more or less (unsurveyed).

* * *

In Witness Whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Two witnesses to execution by lessor:

/s/ M. D. Long
P.O.: Window Rock, Arizona

/s/ R. G. Fister
Acting Area Director
[Seal]

/s/ Ruby Foster
P.O.: Window Rock, Ariz.

Two witnesses to execution by lessee:

/s/ Betty Jo Lanney	Sinclair Oil & Gas Company
P.O.: 4708 So. 53rd	/s/ T. H. Hammett
Tulsa, Oklahoma	Vice President [Seal]
/s/ Owen D. Knott	/s/ V. C. Bash, Secretary
P.O.: 926 So. Darlington	
Tulsa 12, Oklahoma	

ACKNOWLEDGMENT OF LESSOR

State of Arizona ss:
County of Apache

Before me, a notary public, on this 21 day of June, 1951, personally appeared R. G. Fister, Acting Area Director, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

My commission expires February 29, 1952.

/s/ Adele Samuelson
Notary Public in and for the
County of Pima, State of
Arizona

UNITED STATES
DEPARTMENT OF THE INTERIOR

The within lease is hereby approved.

Lease Canceled: Date: September 1, 1957

/s/ R. D. Hold
Assistant Area Director

Filed for record this _____ day of _____, 19__.

Department of the Interior
Bureau of Indian Affairs
Washington 25, D.C.
Approved: July 12, 1951

/s/ D. S. Myer
Commissioner of Indian Affairs

Rental received, \$4,000.00.

Two Witnesses to Execution by Lessee:

/s/ V. K. Stone Phillips Petroleum
P.O.: Bartlesville, Oklahoma Company:

/s/ P. K. Clayton /s/ F. O. Stein
P.O.: Bartlesville, Oklahoma Vice President

Attest: /s/ R. E. Arnold
Asst. Secretary

Two Witnesses to Execution by Lessee:

/s/ John R. Hudman Skelly Oil Company
P.O.: Tulsa, Oklahoma /s/ A. L. Cashman
Vice President

/s/ Marion F. Wall
P.O.: Tulsa, Oklahoma Attest: [Illegible]
Secretary

PLAINTIFF'S EXHIBIT 5

CONTRACT I-22-Ind-2622

Land: Minerals 33477-43

Land: Minerals 46556-43

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs

OIL AND GAS MINING LEASE —
TRIBAL INDIAN LANDS

Ute Mountain Tribe, State of Colorado.

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 26th day of June, 1943, by and between Emma South Beecher, Acting chairman of the Ute Mountain Tribal Council of Towaoc, State of Colorado, for and on behalf of the Ute Mountain Tribe of Indians, designated herein as lessor, and Southern Union Production Company, a Delaware Corporation authorized to transact business in Colorado and having an office in the city of Dallas, State of Texas, herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of \$13,104.00, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of La Plata, State of Colorado, and more particularly described as follows:

Beginning at a point one mile west of Southern Ute Boundary line where same crosses Colorado-New Mexico state line on west side of Sec. 7, T. 32 N., R. 13 W. THENCE one and one-half miles north, THENCE two miles west, THENCE one mile south, THENCE One-half mile west, THENCE one-half mile south to state line, THENCE along stage line two and one-half miles east to point of beginning, land all lying in La Plata County, Colorado, in T. 32 N., R. 14 W., N.M.P.M., containing 2080 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

14. In addition to its other agreements herein and as further consideration for this lease, the lessee agrees:

- (a) to commence a well within 60 days from date of approval of the lease, and to continue drilling unless relieved therefrom by the Supervisor of the United States Geological Survey, to a depth sufficient to thoroughly test the Dakota Soil; provided, however, that in no event shall the lessee be required to drill such well to a depth greater than 3500 feet from the surface of the ground.
- (b) to employ Ute Indian labor in all unskilled capacities, including truck drivers, in its drilling and operation of any well on the lands covered hereby.

In Witness Whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to execution by lessor:

/s/ Charley D. Whitehorn	/s/ Emma South Beecher
P.O.: Towaoc, Colorado	[Seal]
/s/ Louis Breuninger	Acting chairman of the
P.O.: Ignacio, Colorado	Ute Mountain Tribal
	Council

Two witnesses to execution by lessee:

/s/ Arlene Rawls	Southern Union Production
P.O. Dallas, Texas	Company
/s/ Frank M. Carr	/s/ J. C. Reid
P.O.: Dallas, Texas	Vice President

Attest: H. V. McCankey
Secretary

ACKNOWLEDGMENT OF LESSOR

State of Colorado: ss:
County of LaPlata:

Before me, a notary public, on this 19th day of July, 1943, personally appeared Emma South Beecher, Acting Chairman of the Tribal Council of the Ute Mountain Tribe of Indians to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

/s/ Earl V. Mason
Notary Public
La Plata County, Colorado

My commission expires April 8, 1944.

JA 140

UNITED STATES
DEPARTMENT OF THE INTERIOR

Washington, D.C.
December 4, 1943

The within lease is hereby approved.

/s/ Oscar L. Chapman
Assistant Secretary of the
Interior

Filed for record this _____ day of _____, 19__.

Rental received, \$ _____.

By: _____

ACKNOWLEDGMENT OF LESSEE

STATE OF TEXAS ss:
COUNTY OF DALLAS

I, Margaret Boswell, a Notary Public in and for said county and state, do hereby certify that J. C. Reid and N. V. McCankey, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument as having executed the same respectively as Vice President and Secretary of the Southern Union Production Company, a corporation, and who are known to me to be such officers, respectively, appeared before me this day in person, and did severally acknowledge, that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that the same was thereunto affixed by the authority of said corporation; that said instrument was by like authority subscribed with its corporate name; that the said J. C. Reid is the Vice President of said corporation and the said N. V. McCankey is the Secretary thereof; that by the authority of said corporation they respectively sub-

scribed their names thereto as the Vice-President and Secretary, and that they signed, sealed and delivered the said instrument of writing as their free and voluntary act and deed and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth.

Given under my hand and seal this 6th day of August, 1943.

/s/ Margaret Boswell
Notary Public, Dallas County,
Texas.

My Commission Expires June 1, 1945.

PLAINTIFF'S EXHIBIT 6

Contract No. I-22-Ind-2760
Land: Minerals 1244-47

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
OIL AND GAS MINING LEASE -
TRIBAL INDIAN LANDS

Ute Mountain, Ute Tribe, State of Colorado

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 26th day of November, 1946, by and between George Mills, Chairman, Ute Mountain, Ute Tribal Council of Towaoc, State of Colorado, for and on behalf of the Ute Mountain, Ute Tribe of Indians, designated herein as lessor, and Delhi Oil Corporation of Dallas, State of Texas, herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of \$162,-005.00, paid to the Treasurer of said Tribe where the

tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of La Plata, State of Colorado, and more particularly described as follows: Beginning at a point on the Colorado-New Mexico State Line which is one-half ($1/2$) mile west of the intersection of such State Line with the Ute Indian Reservation boundary on the west side of Section 7, Township 32 North, Range 13 West, N.M.P.M., Colorado, From said point of beginning, North two and three quarter ($2-3/4$) miles; thence West three (3) miles; thence South one and one-quarter ($1-1/4$) miles; thence West one-half ($1/2$) mile; thence South one (1) mile; thence West one (1) mile; thence South one-half ($1/2$) mile to the Colorado-New Mexico State Line; thence east along said State line one and one-half ($1-1/2$) miles; thence North one-half ($1/2$) mile; thence east one-half ($1/2$) mile; thence North one (1) mile; thence east two (2) miles; thence South one and one-half ($1-1/2$) mile to the Colorado-New Mexico State line; thence east along said State Line one-half ($1/2$) mile to the point of beginning; containing 4,000 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

* * *

14. In addition to its other agreements herein and as further consideration for this lease, the lessee agrees:

(a) To drill a well to test thoroughly the Pennsylvanian formation, which, according to available geological information, will mean drilling to a depth of not more than 9,900 feet; said well to be completed on the leased land within five (5) years after the approval of the lease, otherwise the lease will be subject to cancellation and forfeiture.

(b) To employ Ute Indian labor in all unskilled positions, including truck drivers.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to
execution by lessor:

/s/ Floyd O. MacJoidden
Ignacio, Colo.

/s/ M. M. Zolla
Ignacio, Colo.

Two witnesses to
execution by lessee:

/s/ Frank M. Carr
Dallas, Texas

/s/ Mary McWilliams
Dallas, Texas

/s/ George Mills, Chairman,
Ute Mountain Ute Tribal
Council

DELHI OIL CORPORATION

/s/ J. C. Reid
Vice President

Attest: H. V. McConkey
Secretary

[Acknowledgment of Lessor - Dated January 2d, 1947]

[Approval of lease by Warner W. Goodwin, Assistant
Secretary of the Interior, January 28, 1947]

PLAINTIFF'S EXHIBIT 7

**UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS**

Contract No. I-22-Ind. 2806

**OIL AND GAS MINING LEASE—
TRIBAL INDIAN LANDS**

Ute Mountain Tribe, State of Colorado

THIS INDENTURE OF LEASE, made and entered into in sextuplicate this 22nd day of June, 1951, by and between George Mills, Chairman, Ute Mountain Tribal Council of Towaoc, State of Colorado, for and on behalf of the Ute Mountain Tribe of Indians, designated herein as lessor, and Continental Oil Company of Denver 2, State of Colorado, herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of \$230,-316.80, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the counties of Montezuma and La Plata, State of Colorado, and more particularly described as follows:

Unsurveyed Tribal lands beginning at a point on the south line of T. 33 N., R. 13 W., three (3) miles west of the northwest corner of T. 32 N., R. 13 W., N.M.P.M.;

THENCE West two (2) miles; THENCE South two (2) miles; THENCE East one and one-half (1-1/2) miles to the west boundary of the existing Ute Mountain Oil and Gas Lease Contract No. I-22-Ind. 2760; THENCE North one (1) mile along the west line of existing Ute Mountain Oil and Gas Lease Contract No. I-22-Ind. 2760; THENCE East one-half (1/2) mile along the north line of said Lease No. I-22-Ind. 2760; THENCE North approximately one (1) mile to point of beginning. Said area comprising approximately 2,240 acres.

containing 2,240 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

* * *

In addition to its other agreements herein and as further consideration for this lease, the lessee agrees:

14. A well must be completed on the leased land within five years after the date of approval of the lease to test thoroughly the Pennsylvanian formation unless at a lessor depth oil or gas is discovered which can be produced in paying quantities or the lessee shall at any time establish to the satisfaction of the Oil and Gas Supervisor, U. S. Geological Survey, Roswell, New Mexico, that further drilling of said well would not be warranted or practicable, provided, however, that the lessee shall not in any event be required to drill in excess of 9,500 feet. In the absence of the completion of such test well within the time allowed, the lease will be subject to cancellation.

15. If so required by the Superintendent, the lessee shall condition under the direction of the Supervisor of the Geological Survey, any wells drilled which do not

produce oil or gas in paying quantities as determined by the said Supervisor, but are capable of producing water satisfactory for domestic, agricultural, or livestock use, in such manner as to make the best and largest quantity of water available for use by the lessors. Adjustment for cost of conditioning of the well and for value of casing and equipment left in or on the well will be made in said cases where it is determined that the well will produce water satisfactorily as aforesaid.

16. The lessee shall employ available Ute Indian labor in all positions which they are qualified including truck drivers and shall protect the Indian farming and grazing rights to the surface of the lands.

17. The lessee will be required to have the leased land surveyed by a registered land surveyor, boundaries posted with substantial markers and a tie established with the nearest corner of a public land survey within six months after approval of the lease, two certified copies of the survey plats to be filed with the Superintendent, Consolidated Ute Agency, Ignacio, Colorado, and two copies with the Oil and Gas Supervisor, P. O. Box 997, Roswell, New Mexico.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to
execution by lessor:

/s/ Stanley T. Poch
Ignacio, Colorado

/s/ Ruth A. Neher
Ignacio, Colorado

Ute Mountain Tribe

By: /s/ George Mills,
Chairman, Ute Mountain Tribal Council

JA 147

Two witnesses to
execution by lessee:

/s/ W. M. Reid
Denver, Colorado

CONTINENTAL OIL
COMPANY

/s/ John E. Norman
Denver, Colorado

By: /s/ J. M. Liddell WMR
Vice President

Attest: /s/ C. C. Riley
Assistant Secretary

[Acknowledgment of Lessor - Dated July 19, 1951]

[Approval of lease for Department of Interior - Dated
September 10, 1951]

PLAINTIFF'S EXHIBIT 8

**UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS**

Contract No. I-22-Ind. 2819

**OIL AND GAS MINING LEASE—
TRIBAL INDIAN LANDS**

Ute Mountain Tribe, State of Colorado

THIS INDENTURE OF LEASE, made and entered into in sextuplicate this 12th day of July, 1950, by and between George Mills, Chairman, Ute Mountain Tribal Council of Towaoc, State of Colorado for and on behalf of the Ute Mountain Tribe of Indians, designated herein as lessor, and El Paso Natural Gas Company of El Paso, State of Texas, herein designated as lessee.

WITNESSETH

1. Lessor, in consideration of a cash bonus of \$326,-200.00, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the above-described tracts of land situated in the county of LaPlata, State of Colorado, and more particularly described as follows:

Unsurveyed Tribal lands beginning at the intersection of the Colorado-New Mexico state line and the Ute Indian Reservation boundary on the West line of Sec. 7, T. 32 N.

R. 13 W., N.M.P.M.; THENCE West one-half (1/2) mile to the southeast corner of existing lease I-22-Ind. 2760; THENCE North two and three quarter (2 3/4) miles to the northeast corner of said lease; THENCE West two and one-half (2 1/2) miles along the north line of lease I-22-Ind. 2760; THENCE North approximately one (1) mile to the south line of T. 33 N., R. 13 W., N.M.P.M., Colorado; THENCE East three (3) miles along the south line of said township to the northwest corner of T. 32 N., R. 13 W., N.M.P.M.; THENCE South approximately three and three quarter (3 3/4) miles along the west line of said township which is also the east boundary of the Ute Indian Reservation, to the point of the beginning, containing approximately 2800 acres, more or less.

containing 2,800 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

2. The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased.

* * *

14. A well must be completed on the leased land within five years after the date of approval of the lease to test thoroughly the Pennsylvanian formation unless at a lessor depth oil or gas is discovered which can be pro-

duced in paying quantities or the lessee shall at any time establish to the satisfaction of the Oil and Gas Supervisor U. S. Geological Survey, Roswell, New Mexico, that further drilling of said well would not be warranted or practicable, provided, however, that the lessee shall not in any event be required to drill in excess of 9,500 feet. In the absence of the completion of such test well within the time allowed, the lease will be subject to cancellation.

15. If so required by the Superintendent, the lessee shall condition under the direction of the Supervisor of the Geological Survey, any wells drilled which do not produce oil or gas in paying quantities as determined by the said Supervisor, but are capable of producing water satisfactory for domestic, agricultural, or livestock use, in such manner as to make the best and largest quantity of water available for use by the lessors. Adjustment of cost for conditioning of the well and for value of casing and equipment left in or on the well will be made in said cases where it is determined that the well will produce water satisfactorily as aforesaid.

16. The lessee shall employ available Ute Indian labor in all positions for which they are qualified, including truck drivers and shall protect the Indian farming and grazing rights to the surface of the lands.

17. The lessee will be required to have the leased land surveyed by a registered land surveyor, boundaries posted with substantial markers and a tie established with the nearest corner of a public land survey within six months after approval of the lease, two certified copies of the survey plats to be filed with the Superintendent, Consolidated Ute Agency, Ignacio, Colorado, and two copies with the Oil and Gas Supervisor, P. O. Box 997, Roswell, New Mexico.

IN WITNESS WHEREOF, the said parties have here-

unto subscribed their names and affixed their seals on
the day and year first above mentioned:

Ute Mountain Tribe

Two witnesses to
execution by lessor:

/s/ Stanley T. Poch
Ignacio, Colorado

/s/ Ruth A. Neher
Ignacio, Colorado

Two witnesses to
execution by lessee:

/s/ R. L. Hamblin
P. O. 1492
El Paso, Texas

/s/ Mildred Schell
P. O. 1881 Building
El Paso, Texas

By: /s/ George Mills
George Mills, Chairman,
Ute Mountain Tribal
Council

EL PASO NATURAL GAS CO.

By /s/ C. L. Perkins
Vice President

Attest: /s/ A. C. Martch
Asst. Secretary

[Acknowledgment of Lessor - Dated July 19, 1951]

PLAINTIFF'S EXHIBIT 9

**UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS**

Contract No. I-22-Ind. 2807

**OIL AND GAS MINING LEASE—
TRIBAL INDIAN LANDS**

Ute Mountain Tribe, State of Colorado

THIS INDENTURE OF LEASE, made and entered into in sextuplicate this 22nd day of June, 1951, by and between George Mills, Chairman, Ute Mountain Tribal Council of Towaoc, State of Colorado, for and on behalf of the Ute Mountain Tribe of Indians, designated herein as lessor, and Continental Oil Company of Denver 2, State of Colorado, herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of \$153,-240.00, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of LaPlata, State of Colorado, and more particularly described as follows:

Unsurveyed Tribal lands beginning at a point on the Colorado-New Mexico state line five (5) miles west of where such state line intersects the Ute Indian Reservation

boundary on the west side of Sec. 7, T. 32 N., Range 13 W., N.M.P.M., Colorado; THENCE West one (1) mile along the Colorado-New Mexico state line; THENCE North approximately one and three quarter ($1\frac{3}{4}$) miles; THENCE East two and one-half ($2\frac{1}{2}$) miles to the West boundary of existing Ute Mountain Oil and Gas Lease Contract No. I-22-Ind. 2760; THENCE South one-quarter ($\frac{1}{4}$) mile; THENCE West one-half ($\frac{1}{2}$) mile; THENCE South one (1) mile; THENCE West one (1) mile; THENCE South one-half ($\frac{1}{2}$) mile to point of beginning, the east boundary of this tract to coincide with the west boundary of said existing lease I-22-Ind. 2760, Comprising approximately 2,000 acres, more or less.

containing 2,000 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

* * *

14. A well must be completed on the leased land within the five years after the date of approval of the lease to test thoroughly the Pennsylvanian formation unless at a lessor depth oil or gas is discovered which can be produced in paying quantities or the lessee shall at any time establish to the satisfaction of the Oil and Gas Supervisor, U. S. Geological Survey, Roswell, New Mexico, that further drilling of said well would not be warranted or practicable, provided, however, that the lessee shall not in any event be required to drill in excess of 9,500 feet. In the absence of the completion of such test well within the time allowed, the lease shall be subject to cancellation.

15. If so required by the Superintendent, the lessee shall condition under the direction of the Supervisor of the Geological Survey, any wells drilled which do not produce oil or gas in paying quantities as determined by the said Supervisor, but are capable of producing water satisfactory for domestic, agricultural, or livestock use, in such manner as to make the best and largest quantity of water available for use by the lessors. Adjustment for cost of conditioning of the well and for value of casing and equipment left in or on the well will be made in said cases where it is determined that the well will produce water satisfactorily as aforesaid.

16. The lessee shall employ available Ute Indian labor in all positions which they are qualified including truck drivers and shall protect the Indian farming and grazing rights to the surface of the lands.

17. The lessee will be required to have the leased land surveyed by a registered land surveyor, boundaries posted with substantial markers and a tie established with the nearest corner of a public land survey within six months after approval of the lease, two certified copies of the survey plats to be filed with the Superintendent, Consolidated Ute Agency, Ignacio, Colorado, and two copies with the Oil and Gas Supervisor, P. O. Box 997, Roswell, New Mexico.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to
execution by lessor:

/s/ Stanley T. Poch
Ignacio, Colorado

/s/ Ruth A. Neher
Ignacio, Colorado

Ute Mountain Tribe

By: /s/ George Mills
George Mills, Chairman,
Ute Mountain Tribal
Council

Two witnesses to
execution by lessee:

/s/ W. M. Reed
Denver, Colorado

/s/ John E. Norman
Denver, Colorado

CONTINENTAL OIL COM-
PANY

By /s/ J. W. Liddell
Vice President

Attest: /s/ C. C. Riley
Assistant Secretary

[Acknowledgment of Lessor - Dated July 19, 1951]

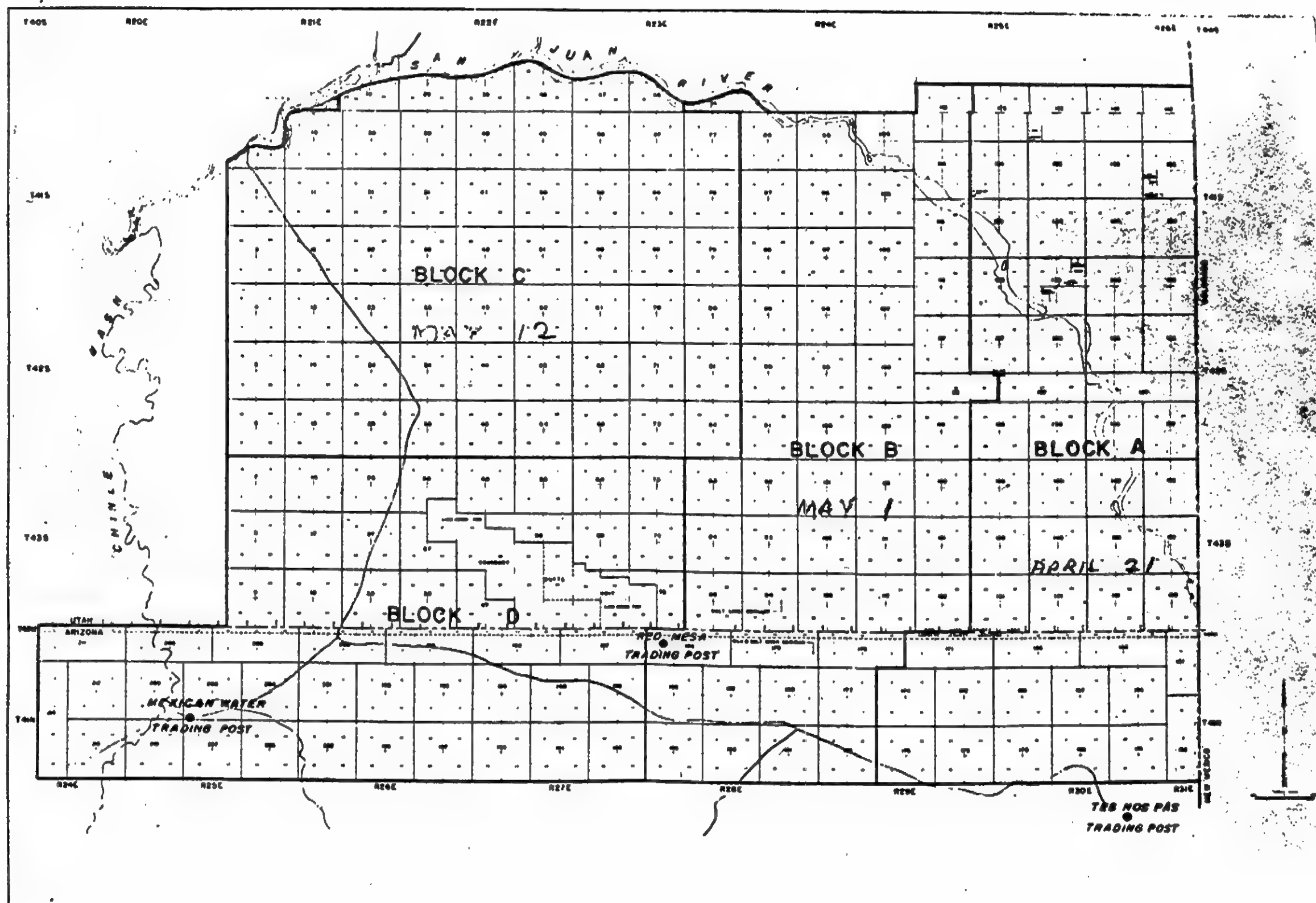
[Excerpt from Advertisement No. 41]

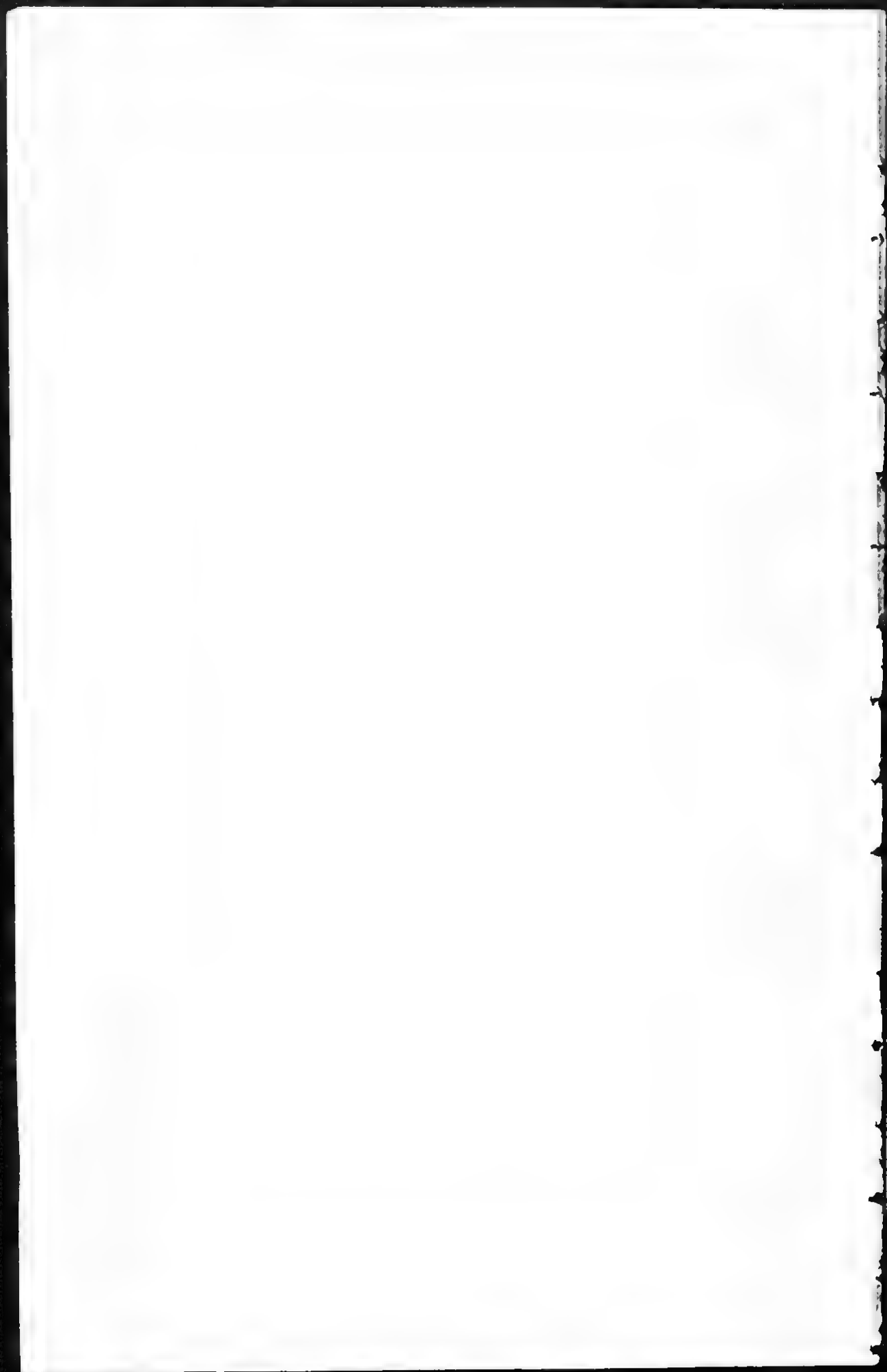
BLOCK B

SAN JUAN COUNTY, UTAH
(Surveyed and Unsurveyed)

Point of origin to which most of the unsurveyed portion of the following tracts are referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.

JA 157





UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Colorado - Utah Region (IV)
Division of Cadastral Engineering
Salt Lake City, Utah

July 28, 1953

SPECIAL INSTRUCTIONS

Providing for

The completion of the survey of the boundaries of

Ts. 40 S., Rs. 21, 22, 23, and 24 E.; Ts. 41 S.,
Rs. 21, 24, and 25 E.; Ts. 42 S., Rs. 25 and 26
E.; and T. 43 S., R. 26 E.;

and

The Survey of the Boundaries of

Ts. 41 S., Rs. 22 and 23 E.; Ts. 42 S., Rs. 21,
22, 23, and 24 E.; and Ts. 43 S., Rs. 21, 22, 23,
24, and 25 E.,

Salt Lake Meridian

under

GROUP 386, UTAH

In the execution of field work under Group 386, Utah, the Chiefs of Field Parties are authorized and directed to make the required surveys hereinafter set out, and will be guided by the Manual of Surveying Instructions, the provisions of these special instructions, and such additional instructions as may be issued pursuant to reports of complications developed during the progress of the field work.

AUTHORITY

The work outlined herein, which is on the Navajo Indian Reservation, has been requested by various oil companies who have been given assurance by the Bureau of Indian Affairs that their bids for oil and gas leases in the area will be accepted in the near future. The purpose of the work is to provide official township boundary surveys to facilitate subsequent identification of individual leases on the ground.

* * *

METHOD OF PROCEDURE

The diagram accompanying these instructions delineates in general the procedures to be followed. The plan is designed to satisfy BLM survey procedures and provide maximum compliance with the oil and gas leases as described in the sale offer by the Bureau of Indian Affairs. Tremendous values may be involved. Accordingly, the survey must not depart materially from the leases as described. However, we are confronted with one substantial discrepancy at the start. It is unfortunate that whoever wrote the lease descriptions evidently was not aware of a shortage of some 7.40 chains in the record length of the east boundary of T. 43 S., R. 26 E., but instead considered the line to be a full six miles long. This creates a situation whereby there will be conflicts between many of the lease descriptions because some are described from lines and corners of the Page and Lentz surveys while others are controlled in position by measurements from the Four-Corner Monument. The procedures herein provided are designed to eliminate the conflicts. However, a limited number of the leases unavoidably will suffer a reduction in area while a few others will be shifted in position. These matters have been discussed fully with the chairman of the survey committee of the oil companies.

* * *

The corner of Ts. 41 and 42 S., R. 24 E. is intended later to be placed on the W. boundary of T. 41 S., R. 25 E., 12 miles distant from the Utah-Arizona line and is expected to result in a fractional distance in the south half mile on the E. boundary of section 36, T. 41 S., R. 24 E.

Survey of Boundaries of Remaining Townships in the Group:

Possible complications concerning the positioning of the corner of Ts. 43 S., Rs. 25 and 26 E. on the Utah-Arizona line have previously been mentioned under procedures for completing the survey of the remaining boundaries of T. 43 S., R. 26 E. When the position of the W. boundary of T. 43 S., R. 26 E. has been determined satisfactorily corners functioning for T. 43 S., R. 25 E. will be placed on the line at intervals of 40 chains counting from the south. The NE. corner of T. 43 S., R. 25 E., common with the SE. corner of T. 42 S., R. 25 E., will be placed on the W. boundary of T. 42 S., R. 26 E., 6 miles distant from the Utah-Arizona line. The positioning of the corners on the E. boundary of T. 42 S., R. 25 E. has been described previously in these instructions in connection with T. 42 S., R. 26 E.

Additional complications may arise in the positioning of the corner of Ts. 43 S., Rs. 24 and 25 E. on the Utah-Arizona line. To comply with the lease descriptions this township corner is to be placed on the State Line 790.50 chains distant from the Four-Corner Monument and here it shall be, provided a straight line connecting it and the SW. corner of T. 41 S., R. 25 E. is within Manual tolerance for the course. This matter has also been discussed between Region IV of the BLM and the chairman of the oil companies survey committee and it was agreed that the corner may move east or west to a limit of 150 links if this results in a range line course within Manual requirements. However, this tolerance of 150 links may not be accumulative in either of ranges 25 or 26 east. In other words, the length of the south boundary each of

T. 43 S., R. 25 E. and T. 43 S., R. 26 E. must be within 150 links of the lease description lengths of 478.50 and 312.00 chains respectively, and furthermore, the overall length through the two ranges must be within 150 links of its total lease description length of 790.50 chains. If use of these tolerances will not result in a course of the range line within Manual limits the Chief of Field Party is directed to forward the information to the Regional Chief, Division of Cadastral Engineering, as soon as the facts are known to him.

When the position of the line between Rs. 24 and 25 E. has been determined satisfactorily it should connect on a straight line by random and true line methods to the SW. corner of T. 41 S., R. 25 E. Measurements on the line will count from the Utah-Arizona boundary and corners common both to Ts. 43 S., Rs. 24 and 25 E. will be placed at intervals of 40 chains until the corner of Ts. 42 and 43 S., Rs. 24 and 25 E. is reached and established at 480.00 chains. Proceeding northward, there will be a double set of corners through Ts. 42 S. Those for R. 24 E. will continue at intervals of 40 chains, still counting from the Utah-Arizona boundary, until the corner of Ts. 41 and 42 S., R. 24 E. is placed on the west boundary of T. 41 S., R. 25 E. twelve miles (960.00 chains) distant. Those for T. 42 S., R. 25 E. will be at intervals of 40 chains counting southward from the SW. corner of T. 41 S., R. 25 E. Fractional measurements are to be placed in the S. half mile on the W. boundary of section 31, T. 42 S., R. 25 E. and in the most southerly half mile on the east boundary of T. 41 S., R. 24 E.

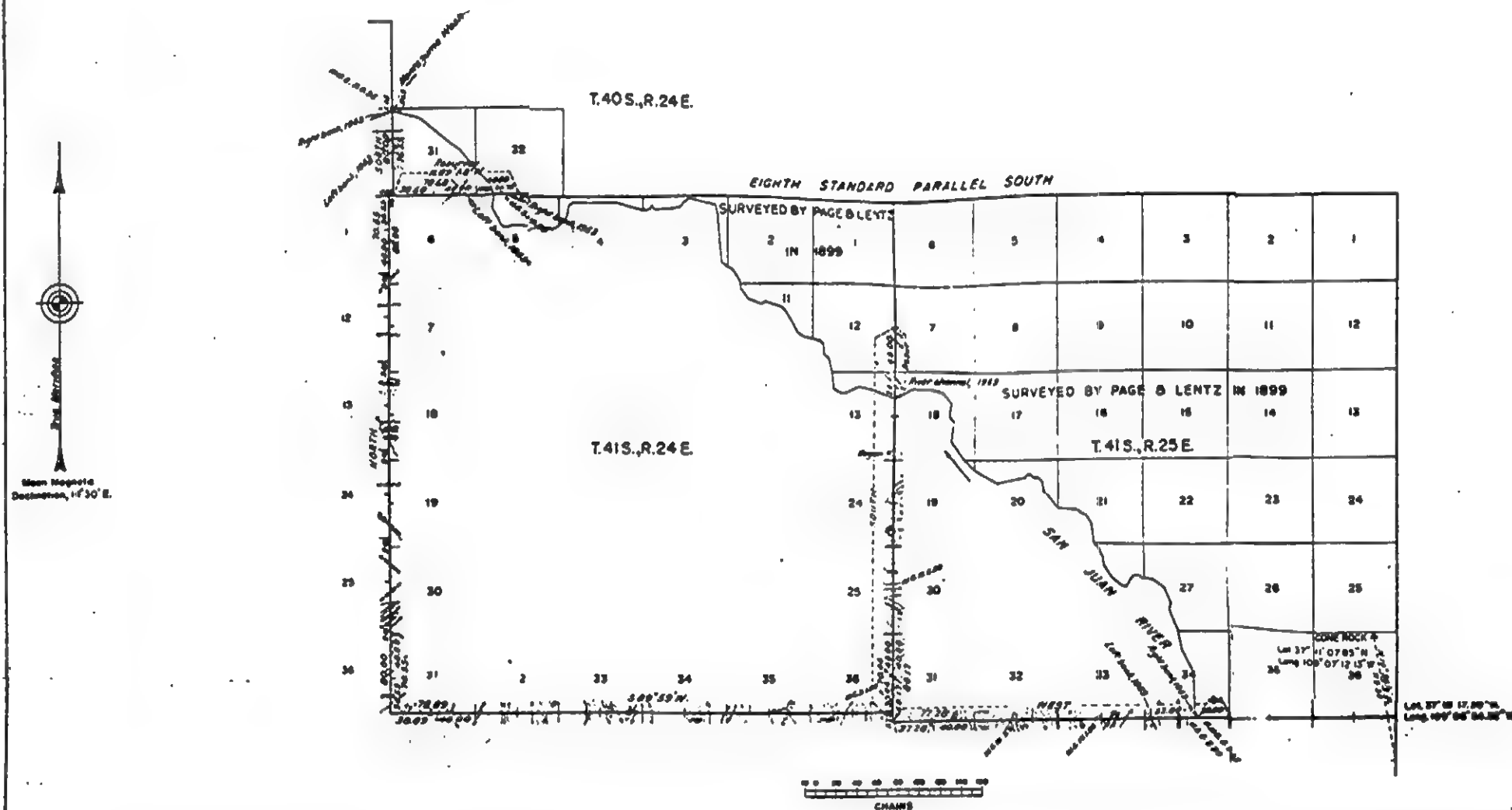
* * *



TOWNSHIP EXTERIORS, SALT LAKE MERIDIAN, UTAH.

OFFICIALLY FILED

July 2, 1954



Portions of South and West boundaries, of T. 40 S., R. 24 E., and T. 41 S., R. 25 E., resurveyed and portions of South and West boundaries of T. 40 S., R. 24 E., and T. 41 S., R. 25 E., and South and West boundaries, of T. 41 S., R. 24 E., surveyed by Andrew Nelson and Robert C. Yundt, August 7 to November 3, 1953, under special instructions for Group 386, Utah, dated July 28, 1953.

Refer to field notes for history of earlier surveys.

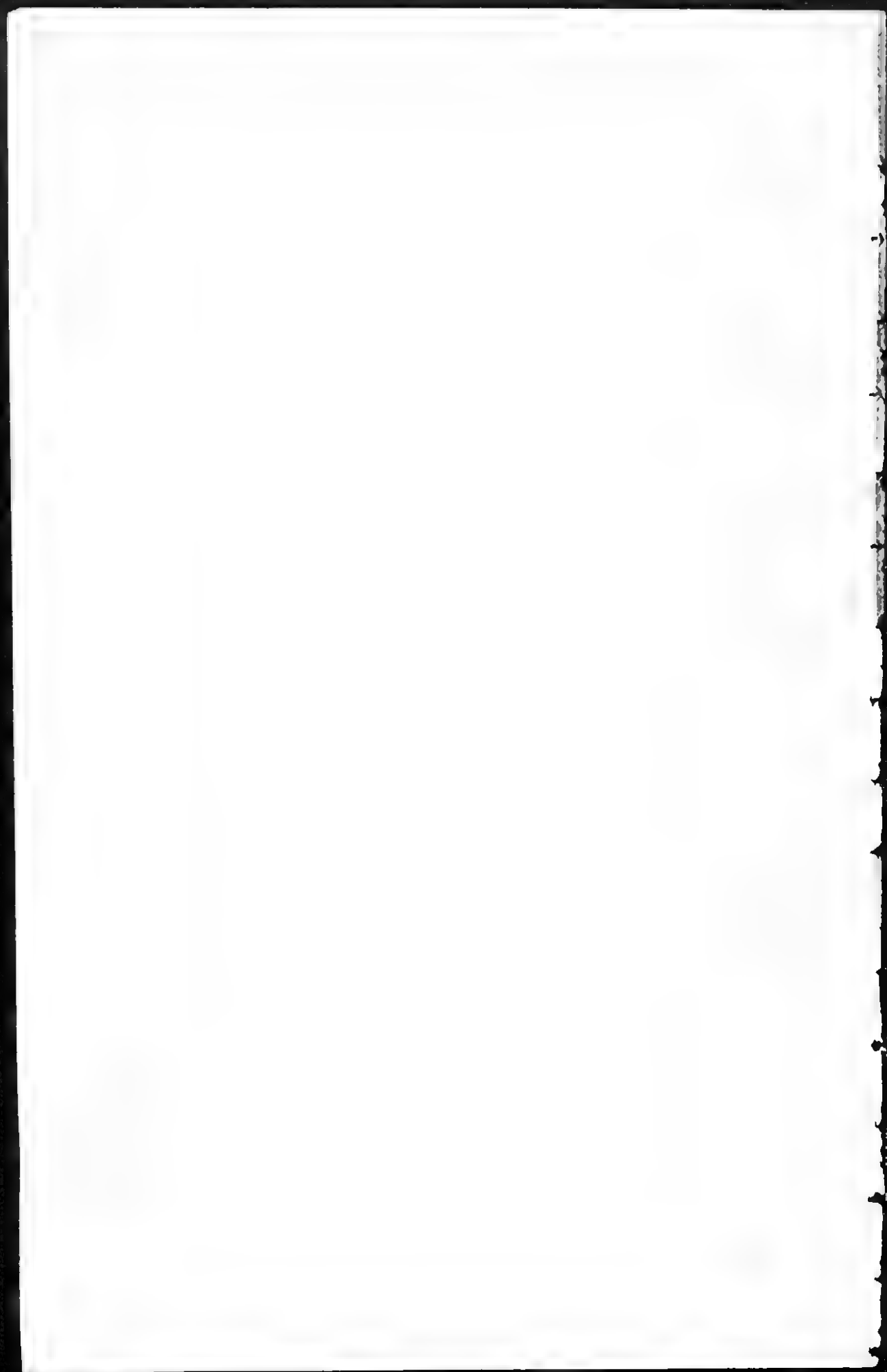
UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D. C. May 10, 1954

This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

Donald O. Clement

Assistant Chief, Division of
Cadastral Engineering



[Filed April 29, 1966]

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Findings of Fact

1. This is an action brought under Section 10 of the Administrative Procedure Act (5 U.S.C. § 1009), and under the Declaratory Judgments Act (28 U.S.C. §§ 2201, 2202). Plaintiff seeks to set aside certain determinations and actions of the Secretary of the Interior.

2. Plaintiff is the lessee and owner of two oil and gas leases covering certain Navajo Indian Tribal Lands in San Juan County, Utah. Defendant is the Secretary of the Interior of the United States. Intervenors are the co-lessees and co-owners of two oil and gas leases in San Juan County, Utah, adjoining plaintiff's leases.

3. On or about May 9, 1958, plaintiff indicated an intention to drill an oil well to be located at a point in San Juan County, Utah. By letter dated July 10, 1958, permission to drill this well was denied by the Supervisor, United States Geological Survey, on the ground that the planned location of such well was on lands not covered by plaintiff's leases.

4. While plaintiff's application was pending, Intervenors filed a notice of intention to drill a well to be located at a point in San Juan County, Utah. Plaintiff protested on the ground that the location of said well would be on lands covered not by intervenors' leases but by plaintiff's leases. Notwithstanding this protest the Supervisor by letter dated July 3, 1958, approved the drilling of intervenors' well.

5. From the adverse rulings of the Supervisor referred to, plaintiff appealed to the Commissioner of Indian Affairs. The Commissioner on October 27, 1958, issued a decision sustaining the rulings of the Supervi-

sor. Plaintiff thereupon appealed to the Secretary of the Interior, who by decision dated November 8, 1961, affirmed the decision of the Commissioner. The ultimate ground of the Secretary's decision was that the leases of plaintiff and of intervenors conveyed land in terms of section descriptions found therein and not in terms of metes and bounds descriptions also found therein.

Conclusions of Law

1. The decision of the defendant Secretary of the Interior is not arbitrary or capricious, does not constitute an abuse of discretion and is not otherwise unlawful.
2. The decision of the defendant Secretary of the Interior is supported by substantial evidence on the administrative record.
3. Defendant and intervenors are entitled to judgment dismissing the action.

/s/ Burnita Shelton Matthews
JUDGE

April 28, 1966

[Filed April 29, 1966]

JUDGMENT

This case having come on for trial before the Court on December 20, 1965, and the Court having heretofore filed its findings of fact and conclusions of law and it appearing that the decision of the defendant dated November 8, 1961, is neither arbitrary, capricious nor an abuse of discretion and is supported by substantial evidence, it is

ORDERED and ADJUDGED that the plaintiff take nothing and that the action be dismissed on the merits.

Dated this 29th day of April, 1966.

/s/ Burnita Shelton Matthews

JUDGE

United States District Court

[Filed June 24, 1966]

NOTICE OF APPEAL

Notice is hereby given that Continental Oil Company, Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the final judgment of this Court entered on the 29th day of April, 1966.

**CONTINENTAL OIL COMPANY,
Plaintiff**

**Samuel W. McIntosh
1266 National Press Building
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Denver, Colorado 80202**

**Floyd E. Radloff
Continental Oil Company
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Denver, Colorado 80202
Attorneys for Plaintiff**



BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,362

CONTINENTAL OIL COMPANY,
Appellant,

v.

STEWART L. UDALL,
Secretary of the Interior,

and

PHILLIPS PETROLEUM COMPANY
and
AZTEC OIL & GAS CO.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
for the District of Columbia Circuit

1956

CLERK
J. V. [unclear]



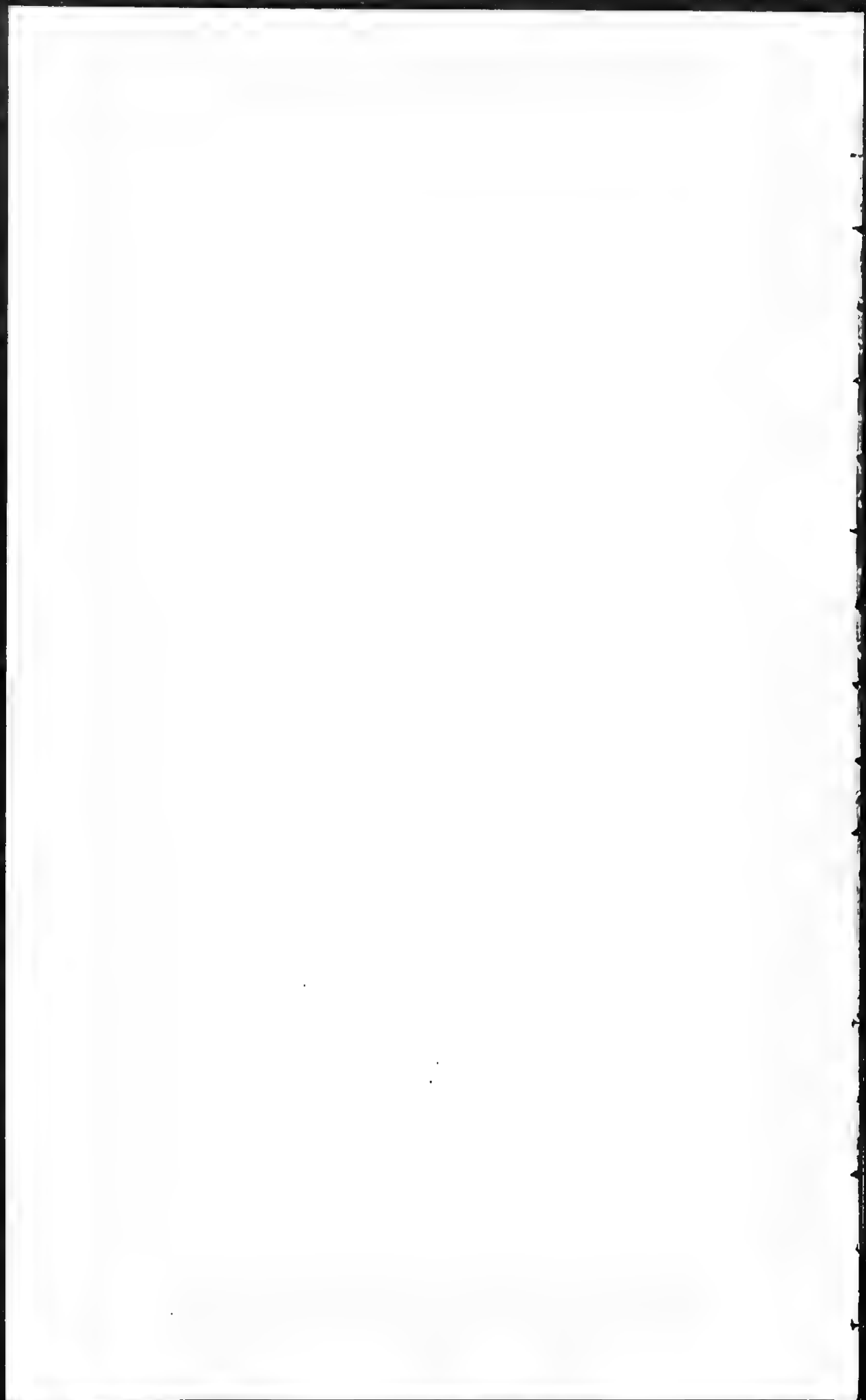
(i)

QUESTIONS PRESENTED

I. Each of the two certain leases between the Navajo Tribe of Indians and Continental Oil Company describes the lands leased by metes and bounds and then goes on to say that the tract "when surveyed probably will be described as follows:", thereafter enumerating the sections that each lease is expected to cover. Do the leases cover the lands described by metes and bounds or the "when surveyed probably will be " sections?

II. On the basis of the entire record in this case, including other provisions in the leases, regulations of the Secretary, and, if competent, the making of a Bureau of Land Management official survey after the lease sale, and the filing of plats by Continental, as lessee, do the leases cover the lands described by metes and bounds or the "when surveyed probably will be" sections?

III. In reviewing an administrative decision of the Secretary of the Interior under the Administrative Procedure Act, are briefs and arguments of the parties before departmental officials and interoffice memos and letters of the Interior Department properly part of the administrative record for review?



(iii)

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OTHERS:

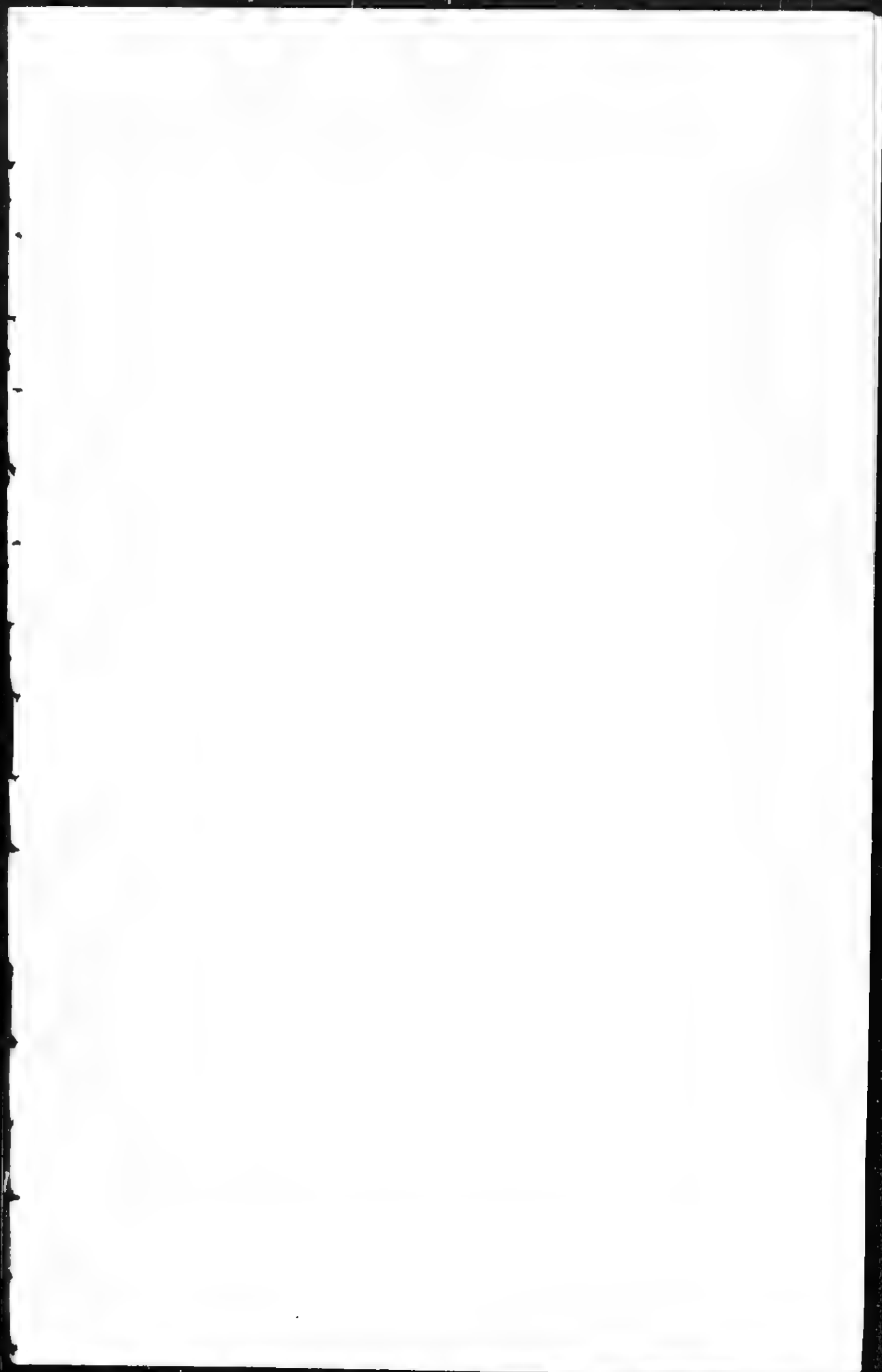
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,362

CONTINENTAL OIL COMPANY,
Appellant,

v.

STEWART L. UDALL,
Secretary of the Interior,

and

PHILLIPS PETROLEUM COMPANY
and
AZTEC OIL & GAS CO.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JUDGMENT BELOW

The District Court did not write an opinion but made Findings of Fact and Conclusions of Law (JA 165). In the Findings of Fact, after reciting how this controversy arose and describing the proceedings in the Department of the Interior, the court said that the ultimate grounds of the Secretary's decision was that the leases involved conveyed lands in the terms of the section descriptions found therein and not in terms of the metes and bounds

descriptions also found therein. In the Conclusions of Law, the court ruled that the decision of the Secretary of the Interior was not arbitrary or capricious, did not constitute an abuse of discretion, and was not otherwise unlawful. The court further concluded that the Secretary's decision was supported by substantial evidence on the administrative record.

JURISDICTION

This is an appeal from a judgment of the United States District Court for the District of Columbia, entered April 29, 1966, dismissing the action and holding that the appellant take nothing (JA 167). The District Court entered Findings of Fact and Conclusions of Law (JA 165). Notice of Appeal was filed June 24, 1966 (JA 168).

The jurisdiction of the United States District Court for the District of Columbia was invoked under Title XI, Section 306, Code of the District of Columbia; Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. § 1009); and the Declaratory Judgment Act (62 Stat. 964, 28 U.S.C. §§ 2201-2202). The jurisdiction of this Court rests on 62 Stat. 929, 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Although the administrative record contains much material which Continental contends is not properly part of the administrative record, this statement is based on the entire record in the case in order that the Court may have a comprehensive view of the whole situation involved in this litigation. Continental's objections will be taken up separately later in the brief.

Under date of March 24, 1953, the United States Department of the Interior, Bureau of Indian Affairs, Window Rock Area office, Window Rock, Arizona, advertised an oil and gas mining lease sale for Navajo Tribal lands,

Arizona and Utah, Four Corners area. After setting forth various conditions of the sale, the advertisement described the tracts to be leased. Tracts covering surveyed lands were described by section, township and range. Tracts covering unsurveyed lands were described by metes and bounds. Generally, where the description was by metes and bounds, there was also a provision that the tract "when surveyed probably will be described as follows:", such provision then going on to enumerate the sections that would probably be covered "when surveyed." In some cases, the words "if surveyed" were used rather than "when surveyed" (JA 16).

The advertisement further specified that certain conditions set forth therein were to be incorporated in the leases (JA 18). Among these was one that provided in substance that the land was offered on a tract basis and that the acreage stated was for the purpose of computing rentals prior to survey and that thereafter rentals would be computed on the acreage as shown by the survey. Another condition was to the effect that the lessee should survey the leased premises prior to drilling. In providing that these conditions were to be included in the leases, no distinction was made between leases of surveyed lands and leases of unsurveyed lands, it being provided that the conditions would be included in all leases bid in pursuant to the sale.

The advertisement also provided that each lease would be issued in accordance with the Act of May 11, 1938 (52 Stat. 347) and the regulations approved May 31, 1938, as amended or supplemented (25 C.F.R. Part 186).

On May 1, 1953, Continental separately bid in two of the leases of unsurveyed lands offered at the sale (JA 30). Intervenors are the owners of two other such leases identified as Tract No. 87, page 21 of the advertisement, and Tract No. 96 on page 23 (JA 24). Continental's leases, containing metes and bounds descriptions and the "when surveyed probably will be" sections,

were approved on December 10, 1953, by the Secretary, and Intervenor's leases, describing adjoining lands, but otherwise containing corresponding provisions, were approved on January 8, 1954.

On or about June 25, 1953, a group of oil companies requested that a public land survey be made by the Bureau of Land Management of the unsurveyed areas covered by the leases bid in at the sale (JA 42). Such survey was to be of township boundaries only with section and quarter section corners established on the perimeter, but was not to include an interior section survey (JA 42). Pursuant to this arrangement, the survey was made between August 7, 1953, and November 3, 1953 (JA 42) and approved May 10, 1954 (JA 39). The oil companies of which Continental was one, paid for the Bureau of Land Management survey (JA 42). There was, however, no agreement that any of the participants would be bound to conform or adjudicate their leases to such survey (JA 117, 119, 120) and there is no finding of any such agreement in the Secretary's decision (JA 38).

Continental has at all times paid and the lessor, the Navajo Tribe of Indians, has accepted rental on each of Continental's leases on the basis that each of the leases contained 2,560 acres, the approximate acreage included in the metes and bounds description, and some 300 acres more than the acreage included in the "when surveyed probably will be" sections.

In September, 1956, Intervenor's made a private survey of the "when surveyed probably will be" sections enumerated in their leases, and Continental made such a survey in December, 1956, and plats of these surveys were filed with the appropriate departmental officials in accordance with the conditions set forth in the leases (JA 75, 76, 77).


Shortly after filing its section line survey, Continental caused to be drilled a well for oil and gas on one of its

leases. This well came in as a producer in March of 1957 (JA 45) and comprised the discovery well in the White Mesa Field (JA 8). In June, 1957, Intervenor commenced an offset well to the north (JA 8). Meanwhile, in April, 1957, one of the oil companies holding leases in the area circulated to all operators in the area a proposed agreement providing in substance that each lessee agreed that his lease boundaries be conformed to section lines in order to govern discrepancies that existed in certain cases between the metes and bounds and the "when surveyed probably will be" sections. However, this agreement was not signed by Continental (JA 9).

Thereafter, in July, 1957, Continental, prior to the completion of Intervenor's offset well, surveyed the boundaries of each of its leases as described by metes and bounds and duly filed a plat of this survey with appropriate departmental officials, and this plat has ever since remained in the official departmental files (JA 78).

The strip of land which is the subject of this litigation is 624 feet wide and four miles long and contains approximately 300 acres (JA 39). This is graphically shown in the following plat, the 624-foot wide strip being cross-hatched:

PLAT

PHILLIPS - AZTEC LEASES			
19	20	21	22
14-20-603-353		14-20-603-355	
			
	CONTINENTAL	LEASES	
30	29	28	27
14-20-603-407		14-20-603-409	
31	32	33	34

T
41
S

R.24.E

SAN JUAN CO.,
UTAH

If the metes and bounds descriptions in Continental's and Intervenor's leases govern, the boundary lies along the north of the cross-hatched area and the cross-hatched area is included in Continental's leases. If the "when surveyed probably will be" sections govern, then the boundary lies along the south of the cross-hatched area and that area is included within the Intervenor's leases.

The matter came before the Secretary on intermediate appeals through the office of the Commissioner of Indian Affairs upon (1) the refusal of the Supervisor, United States Geological Survey, Roswell, New Mexico, to approve Continental's notice to drill within the cross-hatched area; (2) the action of the Supervisor in approving a notice of intention to drill filed by Intervenor; and (3) Continental's request for a determination of the north boundary of its leases (JA 61).

Intervenor participated in all proceedings before the Commissioner of Indian Affairs and the Secretary.

Under date of November 8, 1961, the Secretary handed down a decision adverse to Continental (JA 38). This was a final administrative determination, and Continental duly proceeded to seek court review thereof in the United States District Court for the District of Columbia. The District Court disposed of the case as set forth on page 1, *supra*. *Appeal of Continental Oil Company*, 68 I.D. 337 (1961).

STATUTES AND REGULATIONS INVOLVED

52 Stat. 347, 25 U.S.C. §§ 396a, 396b.

"§ 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. May 11, 1938, c. 198, § 1, 52 Stat. 347.

"§ 396b. Public auction of oil and gas leases; requirements

Leases for oil- and/or gas mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest

"bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464-475, 476-478, and 479 of this title. May 11, 1938, c. 198, § 2, 52 Stat. 347."

25 C.F.R. § 171.8 states:

"§ 171.8¹ **Lands to be in compact body.**

The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys, except that leases covering lode ground may consist of one or more adjoining parallelograms 1,500 feet in length by 600 feet in width, as provided by the United States mining laws. No lease under the regulations in this part shall convey any extralateral rights, and no coal lease shall have a length exceeding 1 mile along the outcrop."

STATEMENT OF POINTS

1. The Secretary's decision is not in accordance with law, because, in reaching his decision, the Secretary did not follow sound legal principles, drew misleading inferences from the facts and, in construing the clear and unambiguous description in Continental's leases, took into consideration extraneous circumstances. The court erred in not identifying and correcting the errors of law in the Secretary's decision.

2. The construction of legal instruments and the construction to be placed on a record consisting of material in writing is a matter of applying legal standards to

¹ Prior to 1958, this regulation was numbered 186.8. See 25 C.F.R. § 186.8 (1949). This regulation has been in effect in this form since 1938.

the facts. The court erred in upholding the Secretary's treatment of the case as one involving the application of the Secretary's discretionary and policy making authority rather than his judicial function.

3. The description in Continental's leases is a clear and unambiguous description of lands by metes and bounds. The court erred in not recognizing the clear and unambiguous language in this provision of Continental's leases. The court further erred in upholding the Secretary's construction of the leases as a whole and in upholding the construction placed by the Secretary on the advertisement and on the regulations of the Interior Department and the laws dealing with the leasing of Tribal lands.

4. The Secretary, in construing Continental's leases, wrongfully took into consideration extraneous circumstances, to-wit: (1) the circumstances surrounding the making of the Bureau of Land Management Survey, and (2) the circumstances involving Continental's first filing section plats and thereafter filing metes and bounds plats of its leases; and, further, after having wrongfully considered these circumstances, the Secretary placed an erroneous construction thereon. The court erred in upholding the construction placed by the Secretary on these circumstances.

5. Briefs of the parties, the transcript of the argument, and interoffice memoranda and correspondence within the department were not part of the administrative record. The court erred in ruling that such materials comprise part of the administrative record and in admitting such materials in evidence.

SUMMARY OF ARGUMENT

Continental and the Navajo Tribe of Indians entered upon two certain oil and gas leases which in clear and unambiguous terms described the lands leased by metes and bounds. The language of these leases is not susceptible of any other construction.

The Secretary in his decision failed to recognize the true meaning of the descriptions in these leases. He misconstrued the significance of various conditions of the leases. He erroneously took into consideration extraneous circumstances involving happenings both before and after the leases were entered upon. He assumed the role of an advocate and sought to substantiate an administrative position taken by his subordinates rather than to reach a judicially sound construction of Continental's leases. In evaluating the record, he exercised his policy making function instead of applying legal standards to the facts. While the Secretary has wide discretionary authority in determining the form of lease to be issued, once the form is settled upon, the construction of the language in the lease is a judicial function.

In misconstruing Continental's leases, the Secretary committed an error of law which is subject to review under the Administrative Procedure Act.

The description in the leases being clear, conditions elsewhere in the instruments and departmental regulations are not properly an aid to construction. Moreover, such conditions and regulations properly interpreted are consistent with the metes and bounds description.

In the light of the clear and unambiguous character of the leases, it is improper to consider extraneous circumstances in construing them. Such circumstances were, however, considered by the Secretary. Among those circumstances so considered were the advertisement of the lease sale, circumstances surrounding the making of an official Bureau of Land Management Survey in the months following the lease sale, the filing of certain plats some four years after the lease sale, and intradepartmental memoranda in which subordinate officials of the Interior Department purported to set forth their views as to the "intent of the leasing operation."

All facts with respect to these extraneous circumstances are, however, documented in the record, and, if they are material, this court is in as good a position to interpret their significance as was the Secretary or the District Court. A review of this material shows that it is consistent with Continental's position and that it is not consistent with that of the Secretary or the Intervenor. Moreover, much of the material in the administrative record filed in the District Court was not properly part of the administrative record for review, and Continental's objections thereto should have been sustained.

ARGUMENT

I

The Secretary's Decision Is in Error as a Matter of Law

A careful analysis of the record before the Secretary shows not only that the Secretary's decision is in error as a matter of law but also that departmental officials approached this case with an attitude of seeking to justify a preconceived result rather than in a spirit of reaching a decision based on sound legal principles.

A. The Determination of the General Superintendent, Navajo Indian Agency

On June 4, 1958, John A. Anderson, Oil and Gas Supervisor, U.S.G.S., Roswell, New Mexico wrote the General Superintendent, Navajo Indian Agency, Window Rock, Arizona (JA 79). In this letter, Anderson recited the facts relative to the issuance of the leases, the notices of intention to drill filed by Continental and Intervenor, and the plats, and requested an opinion as to ownership of the leases.

On July 3, 1958, the General Superintendent responded to this letter (JA 81), making his determination that Continental's leases cover the "when surveyed probably

will be" sections and set forth the following reasons for such determination:

"You call attention to the fact that the plats of survey furnished by Continental Oil Company for leases Nos. 407 and 409 in the first instance conformed with the boundaries established for Sections 27 through 34, T. 41 S., R. 24 E., S.L.M., as surveyed by the Bureau of Land Management. Later Continental filed an amended plat which did not conform with this survey. Phillips Petroleum Company and Aztec Oil & Gas Company have filed plats for leases Nos. 353 and 355 covering Sections 15 through 22, T. 41 S., R. 24 E., which conform with the Bureau of Land Management surveys for these sections.

"It was the intent of this Agency and, we believe, of the Navajo Tribe that all leases in unsurveyed areas of Navajo Tribal lands would conform to the public land survey by section, township and range. This was the basis for offering such lands for lease, as required by regulation of the Department contained in Title 25, C.F.R., Part 171.8."

Now that is a complete statement of the considerations that were taken into account in the initial determination in this case. There is nothing to show that any effort was made either to establish the legal principles that should be followed or to apply sound legal principles in arriving at this determination. The decision of the Regional Oil & Gas Supervisor, U.S.G.S., on Continental's application to drill and protest against Phillips Petroleum Company's application to drill, to which Continental takes exception, were based on this determination.

Then on July 25, 1958, in transmitting Continental's appeal to the Superintendent, Navajo Indian Agency, Anderson says: "Two copies of such determination (i.e. the determination of July 3, 1958) were transmitted to Continental on July 10, 1958, by the Supervisor. The determination was made after full consideration of all the facts of the case, including those presented by Continental in its Statement of Facts attached to the appeal"

(JA 87). Since Continental's appeal wasn't taken until 15 days after the determination was dated, the statement that in making the determination consideration was given to facts presented by Continental in its appeal is clearly erroneous.

Then on July 31, 1958, the General Superintendent transmitted the documents in connection with Continental's appeal to the Commissioner of Indian Affairs, saying: "It is our thinking in the matter that Agency, Tribal and Area views were thoroughly expressed in our joint letter of July 3, 1958, to the Supervisor" (JA 89). These are the views quoted above in this Section A.

B. The Decision of the Commissioner of Indian Affairs

Thereafter, on October 27, 1958, the Commissioner of Indian Affairs, without hearing, handed down his decision denying Continental's appeal, predicated it upon the "intent at the time the tracts were advertised for sale" (JA 90).

Now, the intent referred to is the undisclosed subjective intent of subordinate departmental officials as reported by them to their superiors. It is found in the letter of July 3, 1958, from the General Superintendent to the Supervisor, U.S.G.S., at Roswell, quoted *supra*, page 12. This letter does not reflect an intent of the parties derived from the instruments. It is wholly incompetent and inadequate to support his conclusion as a matter of law.

Next, the Commissioner construes Continental's leases by reference to a regulation, 25 C.F.R. § 171.8. But, this regulation on its face applies to surveyed lands only, because obviously unsurveyed lands are not identifiable by reference to the system of public land surveys. It has been so interpreted by the Secretary as is evident from the fact that it had long been his practice to lease unsurveyed Tribal lands by leases which, in

form, contain only a metes and bounds description (JA 121 through 155). The Commissioner of Indian Affairs was in error in misinterpreting the significance of this regulation and using it as an aid to construction of the description in Continental's leases.

Then the Commissioner says Continental could "easily have verified the intent to use the recently surveyed exterior corners" before drilling was started — an utterly irrelevant observation since Continental was entitled to rely on the language in its leases and had no occasion to make any inquiry at all.

C. Prejudice of Departmental Officials

From the foregoing recapitulation of proceedings in the Department before this matter reached the Secretary for decision, it is apparent that at no time did departmental officials ever seek a judicial determination of the meaning of Continental's leases, but, on the contrary, exerted their efforts to bring about a result in accordance with the undisclosed intention of certain subordinate officials in the Department to the effect that it was the intent of the leasing operation that the section lines would control. This is confirmed by a letter written by the Acting Commissioner of Indian Affairs under date of January 26, 1959. The matter had reached the Secretary for final administrative decision, and apparently a recheck was being made as to the facts surrounding the survey made by the Bureau of Land Management after the lease sale. The Commissioner in his letter, which was directed to the Area Director, in Gallup, New Mexico, asked for copies of the oil companies' signed agreements to the survey, and then went on to explain the reason for such inquiry by saying: "As it would greatly support our contention in the case, ***" (JA 117). It is difficult to imagine a less judicial state of mind than that evidenced by this inquiry.

D. Absence of Any Agreement

The response to this inquiry of the Commissioner was simply that there was no agreement that lease boundaries would be conformed to the official survey (JA 117). By letter dated February 12, 1959, Leo M. Petersen, Area Cadastral Engineer, Bureau of Land Management, who was the very man who worked out all the arrangements relative to the official survey, wrote: "*** there was no agreement or agreements prior to commencing the work that any of the participants would be bound to adjudicate their leases to our survey" (JA 120).

The reason the companies wanted a survey is self-evident. The survey greatly assisted in locating and surveying out individual lease boundaries as described by metes and bounds because it established official U.S.G.S. markers close to the metes and bounds boundaries, which could serve in making the private surveys of the leased premises required by the leases. That there was no agreement is further evidenced by the fact that one of the companies some years later circulated among lease owners in the area just such an agreement as the Commissioner inquired about (JA 9). This Continental declined to sign (JA 9).

E. The Secretary's Decision

On the basis of this kind of a record and without a hearing, the Secretary, after submittal of briefs and oral argument, handed down his decision under date of November 8, 1961 (JA 38).

(1) Fundamental Errors

Basically, this decision proceeds on two grossly erroneous fundamental principles. First, it is not judicial but reflects an effort to substantiate what the Commissioner characterized as "our contention in the case." Second, the decision is predicated not on judicial con-

siderations but on what subordinate officials said was "the intent of the leasing operation" (JA 42). On the face of the record, it is clear that the Secretary did not apply sound legal principles in construing Continental's leases. He has confused his policy making authority with his judicial function. He could have, as a matter of administrative policy, leased the unsurveyed Tribal lands on the basis of drawing board protractations of the system of public land surveys and referred to the land leased by "when surveyed" sections; but having leased the lands by metes and bounds, the construction of the leases is no longer a matter of policy but is one of legal interpretation.

(2) Other Errors

The Secretary also displays a lack of appreciation of the niceties of conveyancing. At one point in his decision (JA 43), he says, "When these conditions are given their full force and effect, it is seen that the contract has more elasticity than Continental appears to recognize." The notion that the description in a lease has "elasticity" is just plain nonsense.

Elsewhere in his decision, the Secretary asserts as facts things that are mere inferences he has drawn from the facts. He says that, "it was clearly indicated that a survey was to be made which would describe the leased areas by sections" (JA 43). That was not clearly indicated at all as a simple reading of the lease rider shows. At another point, he says that "The land was offered on a tract basis and the bids were not on an acreage basis ***." Such a statement, although true, has no probative significance in construing the leases because an area described by metes and bounds is just as much a "tract" as is an area described by sections. And then he goes on to say that the lessee was to "abide by and conform to any and all regulations of the Secretary of the Interior ***." Again, there is no probative significance to the fact asserted. Such regulations are not properly an aid

in construing the language in the description in Continental's leases.

These examples of loose and erroneous thinking by the Secretary are intertwined in his decision with errors in applying required standards of legal construction which are dealt with fully in the following sections of our brief.

II

The Required Standards To Be Applied in This Case Are Those Applicable to the Construction of Instruments of Conveyance

The review of the Secretary's decision here involved is not a review involving questions of fact but consists rather of a review of the standards required to be applied in construing Continental's leases on the basis of undisputed facts in the record. This is essentially a paper case. It did not involve testimony of live witnesses. All that is involved are Continental's leases and the proper legal construction to be placed on them.

It makes no difference whether in construing Continental's leases the Court confines itself to the language of the leases themselves or resorts to extrinsic evidence. In either case, this Court has before it the same written documentary evidence and materials that were before the lower court and before the Secretary.

The question is simply one of whether these documents support the lower court and the Secretary's ultimate legal conclusion that the leases conveyed lands in terms of the "when surveyed probably will be" sections. This is not a question of administrative discretion. It is not a question of fact. It does not involve the application of Rule 52(a) of the Federal Rules of Civil Procedure that: "Findings of fact shall not be set aside unless clearly erroneous ***."

We are dealing here solely with a question of law. That question of law is whether the Secretary properly construed Continental's leases. As in the case of *United States v. General Motors Corporation*, 16 L.Ed.2d 415, 424, n. 3 (1966), the record should be resorted to not to contradict the trial court's findings of fact nor those of the Secretary but to assist in determining whether the findings "support the court's ultimate legal conclusion" as to the lands conveyed by the leases.

It is well settled that appellate courts have untrammelled power to interpret written documents. *Frost v. Davis*, 346 F.2d 82 (5th Cir. 1965); *Republic Pictures Corp. v. Rogers*, 213 F.2d 662 (9th Cir. 1954); *Cordovan Associates, Inc. v. Dayton Rubber Company*, 290 F.2d 858 (6th Cir. 1961). In the *Cordovan* case, the court said at page 860:

"The interpretation and construction of a written contract are matters of law within the competence of the Court of Appeals to review and do not come under the clearly erroneous rule. *Crosley Radio Corp. v. Dart*, 6 Cir., 1947, 160 F.2d 426. In *Eddy v. Prudence Bonds Corporation*, 2 Cir., 1957, 165 F.2d 157, 163, certiorari denied *Prudence Realization Corp. v. Eddy*, 333 U.S. 845, 68 S. Ct. 664, 92 L.Ed. 1128 Judge Learned Hand said:

"It is not necessary to analyze the mental process by which a court imposes legal consequences upon verbal utterances; possibly, it is proper to call the result a "finding of fact." It is enough here, that whatever the right description, such a finding is assailable as an ordinary finding of fact is not; for appellate courts have untrammelled power to interpret written documents."

And, where the entire record consists of written evidence, findings of fact of a lower court, and, *a fortiori*, of an administrative official, do not carry the same weight as they do when oral testimony is heard. *Dollar v. Land*, 81 App. D.C. 28, 184 F.2d 245 (1950); *Cherot v. United*

States Fidelity and Guaranty Co., 264 F.2d 767 (10th Cir. 1959).

In the *Cherot* case, the court said at page 768:

"There was no oral testimony in the trial court. The case was submitted on statements at the pre-trial conference, and on the depositions ***. In the absence of oral testimony in the trial court, findings of fact by that court do not carry the same weight on appeal as they do when oral testimony is heard. In that posture of the case, an appellate court is equally capable with the trial court of examining evidence and drawing conclusions therefrom. ***"

III

Continental's Leases Are Clear and Unambiguous

In arguing that Continental's leases are clear and unambiguous, we are in one sense arguing the obvious. Nevertheless, without intending to belabor the matter, we call the following to the Court's attention.

A. The Description of the Leased Premises

Each lease first describes the lands by metes and bounds and then says that the tract "when surveyed probably will be described as follows:", then going on to enumerate certain sections which will probably be covered. The plain and ordinary meaning of the language is beyond serious dispute. The use of the word "probably" makes it crystal clear that the lands leased would not be the sections mentioned unless they should turn out to coincide with the metes and bounds description, because "probably" means "likely" but not "certainly." *Douglas v. Sheridan*, 27 N.J. Super. 544, 90 A.2d 632, 633, and other cases cited in 34 *Words and Phrases* 93 (Perm Ed. 1957). The construction placed on this language by the Secretary is directly opposed to what the words say. The Secretary in his administrative capacity

of supervising Indian lands and approving Tribal leases is responsible for the language and form of such leases. Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. § 396b. If the leases here involved were to cover the "when surveyed" sections, the Secretary should have provided that they were to cover such sections and then referred to the metes and bounds description as merely indicating the area that would "probably" comprise the leased lands. This he did not do.

B. Departmental Decisions Involving Leases of Public Lands

It so happens that the Secretary and his subordinate departmental officials have had occasion to construe language identical in form with that in Continental's leases in a number of instances involving the leasing of public lands. Such language has always been construed to mean that the metes and bounds description controls. *C. S. McGhee*,² GFS BLM-1958-55, Utah 018-343 (March 12, 1958); *Jacob Gordon*, GFS BLM-1958-112, Anchorage 028805 (June 19, 1958); *Alberta Link*, GFS BLM 1958-157, Fairbanks 016136 (September 17, 1958); *Ed M. Catron*, GFS BLM-1959-20, Fairbanks 017592 (March 4, 1959); *Waring Bradley*, *James M. Snowden*, 67 I.D. 241, GFS SO-1960-63 (June 28, 1960); *Memorandum Opinion by Regional Solicitor*, Denver, Colorado, M-36542, GFS SO-1960-16 (August 8, 1958).

For example, in the *C. S. McGhee* case, *supra*, the appellant's lease offer described certain tracts of unsurveyed lands by metes and bounds followed by a "when surveyed will probably be described as" clause. Edward Woozley, Director of the Bureau of Land Management in his opinion, said:

"Since a metes and bounds description is controlling over a 'what will be when surveyed' description, the Manager correctly attempted to

² For the full text of the *McGhee* and other cases here listed, see Appendix "A" of this brief.

plat the lands applied for by the appellant on accepted charts and maps of the Bureau; he adjusted the descriptions of the lands when the lands so platted were in conflict with existing leases. He then issued a lease describing the lands therein contained by metes and bounds; ***."

The action of the Manager in treating the metes and bounds description as controlling was affirmed.

The Secretary in his decision in the case now before this Court sought to distinguish these cases on the grounds they involve leases of public lands rather than Tribal lands. We respectfully submit that in construing the language of an instrument, such a distinction has no significance. The clear and unambiguous language of the description in the leases must be construed to mean the same thing in both instances.

C. The Metes and Bounds Description Is
Clear Under Recognized Standards for
Descriptions in Conveyances

The description says, "beginning at a point 73,293 feet west along the boundary between the States of Utah and Arizona and 63,360 feet north of the point of origin; thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; ***." The words, "73,293 feet west along the boundary between the States of Utah and Arizona" mean along the State boundary line whether or not the boundary runs due west. 1 *Patton Titles*, § 151, Page 401 (2nd Ed. 1957); 6 *Thompson on Real Property*, § 3335, Page 535 (Perm. Ed. 1940); 11 *Corpus Juris Secundum*, Boundaries, § 49, Page 598. The word "west" will be deemed to mean "westerly." *Faris v. Phelan*, 39 Cal. Rep. 612 (1870). The language "and 63,360 feet north of the point of origin" will be construed to read "thence 63,360 feet north." *Johnson v. Harris*, 24 Ky. L. Rep. 449, 68 S.W. 844 (1902). It is common practice for the courts to correct minor errors in metes and bounds descriptions. 1 *Patton on Titles*, § 125 Page 318 (2nd Ed. 1957).

D. The Description Involves Nothing Unusual or Cumbersome in Locating the Lands Leased

There is nothing impractical or cumbersome about a metes and bounds description where the point of beginning lies many miles from the nearest U.S. public land survey marker. There are numerous instances in which the Department of Interior has issued leases containing a metes and bounds description of the type appearing on Continental's leases where the distance between the nearest U.S.G.S. marker and the point of beginning was much greater than in this case. For example, in *Waring Bradley, James M. Snowden, supra*, the lands leased by metes and bounds were described from a U.S.G.S. survey monument some 200 miles away; in the *Jacob Gordon* case, *supra*, the lands leased by metes and bounds were over 400 miles from the survey monument; and in *Ed M. Catron, supra*, the lands leased were over 60 miles from the survey monument.

E. Construing the Leases as a Whole

On page 19, *supra*, we flatly stated that the conditions in the advertisement and in the leases do not indicate that the leases were to cover the "when surveyed probably will be" sections. These conditions do not directly relate to the description of the lands leased. They do not call for an official Bureau of Land Management survey of the leased premises. On the contrary, they specifically call for a private survey by the lessee prior to drilling. Such a condition is consistent only with the metes and bounds description of the leased lands, because a survey by the lessee would be a meaningless act if the boundaries of the leases are established by the official Bureau of Land Management survey "when" made. In this connection, it should be borne in mind that official governmental subdivisions are created by an official Bureau of Land Management survey, and no private party has authority to survey out such subdivisions.

United States v. Montana Lumber & Manufacturing Co., 196 U.S. 573 (1904); *Carroll v. United States*, 154 F. 425 (9th Cir. 1907); *United States v. Wyoming*, 331 U.S. 440 (1947).

Moreover, reference to the original advertisement shows that these conditions were boiler plate provisions. They were to be inserted in all leases bid in at the lease sale. They were not tailor made for any one particular lease. The obvious intent was to provide for any contingency that might come up under any of the leases covered by the sale. The conditions, therefore, should be read in the context of the whole situation, and when so read they are consistent with rather than inconsistent with the metes and bounds description.

F. Regulation 25 C.F.R. § 171.8 Is Not
an Aid in the Construction of the Leases

We have already pointed out at page 13, *supra*, that the Secretary has never construed this regulation as restricting his statutory authority³ to lease unsurveyed Tribal lands by metes and bounds. We have also at page 20, *supra*, pointed out that the Secretary has repeatedly held a description like that in Continental's leases to cover the lands described by metes and bounds where public lands were involved. It is true that the regulations dealing with the leasing of unsurveyed public lands, 43 C.F.R. § 192.42(a)(4) (1949), differ from those dealing with the leasing of Tribal lands in that they are more definitive in dealing with the different procedures to be followed in leasing surveyed lands as contrasted with unsurveyed lands. Whether or not such a difference in the regulations would, in the first instance, have war-

³ The Secretary's authority to approve the leasing of Tribal lands is found in the Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. § 396b. It is noted that this statute in no way restricts the Secretary in the leasing of Tribal lands whether surveyed or unsurveyed.

ranted different administrative procedures in determining the form of lease to be used is a moot matter. Different procedures were not, in fact, adopted. The Secretary has leased both public and Tribal lands by metes and bounds. Once a metes and bounds form is adopted by the Secretary for any particular transaction, the language is susceptible of only one construction regardless of the regulations.

Moreover, 25 C.F.R. § 171.8 in itself is uncertain and ambiguous in that it does not deal with unsurveyed lands separately from surveyed lands. This creates an incongruity. Unsurveyed lands cannot be leased in accordance with the public land system of surveys. A lease of "sections" is ineffective until a survey is made. The interests of the Tribe lie in having unsurveyed lands leased by metes and bounds so that the lessee can go in and survey out his lease and proceed with development without waiting for an official survey. 25 C.F.R. § 171.8 should be construed in a manner consistent with such Tribal interests, and it is apparent that the Secretary has recognized this (JA 121).

G. State and Federal Authorities

Although no cases in state or federal courts have been found involving language identical with that appearing the description in Continental's leases, we have found numerous cases where descriptions of a similar character have been construed by the courts.

The general law is that title passes to lands that are clearly identified and conveyed by appropriate words of grant. The presence of qualifying language elsewhere in the conveyance will not reduce the extent of lands conveyed unless the language used shows a clear intent to do so.

For example, in *Sumner v. Hill*, 157 Ala. 230, 47 So. 565 (1908), the description read in part:

"**** that tract of land situated in Greene County, Alabama, known as the 'Hancock Place' and more particularly described as follows, to-wit:" (the description then went on to enumerate certain subdivisions of a government survey)

The court held that the entire Hancock place was conveyed and that the land conveyed was not limited or reduced by the enumeration of government subdivisions.

In *In re Orwig's Estate*, 185 Iowa 913, 167 N.W. 654 (1918), the description read:

"Lot 1 of Hubbell's subdivision of the northwest quarter of Lot 6 of Rose's addition to Ft. Des Moines, commonly known as 1210 Pleasant Street."

It appeared that 1210 Pleasant Street covered only one-half of Lot 1. The court held that all of Lot 1 was conveyed because the description was clear and unambiguous. There was no occasion to resort to extrinsic evidence.

In *Martin v. Urquhart*, 72 Ark. 496, 82 S.W. 835 (1904), a deed conveyed:

" the property known as the J. J. Martin Plantation, embracing the east two-thirds of the north fractional half of section 6, township 1 north, range 11 west."

The portion of section 6 described comprised only part of the Martin Plantation, but the court held the description was clear and unambiguous and that the deed conveyed the entire Martin Plantation.

In *Meir-Nandorf v. Milner*, 34 Ida. 396, 201 P. 720 (1921), the description read:

"All the certain lot, piece, or parcel of land situate, lying and being in the counties of Fremont and Bingham and state of Idaho, and bounded and described as follows, to-wit: That certain tract of land commonly known as 'Bear Island' and situated principally in section thirty-five (35), township four (4) north, range thirty-seven (37) east, Boise meridian, accordingly as the same may appear described in patent yet to be issued."

The lower court had left to the jury the question of the meaning of this description. On appeal, the Idaho Supreme Court held that it was error to submit the matter to the jury because the description was not ambiguous, saying at page 721:

**** Clearly the deed in controversy was intended to convey the entire tract referred to as Bear Island, for that is what it says. No other reasonable interpretation can be put upon the language. ****

It should also be noted that we are not dealing with a situation where there are conflicting descriptions. The "when surveyed probably will be" clause is clearly subordinate to the metes and bounds description because of the inclusion of the word "probably." Where the language in an instrument is clear and unambiguous, there is nothing to construe. This is commented on in *Conner v. Hendrix*, 194 Va. 17, 72 S.E.2d 259, 265 (1952):

**** Words descriptive of the land conveyed should be given their established, definite, usual and ordinary meaning, unless a contrary intent appears.

'It is not permissible to interpret that which has no need of interpretation. 'The province of construction lies wholly within the domain of ambiguity.' *** If it is too plain to misunderstand, there is nothing to construe. ****'

See also, *Donahue v. McNulty*, 24 Cal. 411, 85 Am.Dec. 78, 82 (1864); *Polebitski v. John Week Lumber Co.*, 157 Wisc. 377, 147 N.W. 703, 705 (1914); *Gaston v. Mitchell*, 192 Miss. 452, 4 So.2d 892, 893 (1941); *Richland Irr. Co. v. Westview Irr. Co.*, 96 Utah 403, 80 P.2d 458 (1938); *Continental Bank and Trust Company v. Bybee*, 6 Utah 2d 98, 306 P.2d 773 (1957).

Other clauses in the leases do not create an ambiguity. The law is that the clear and unambiguous language of the description will not be rendered vague and uncertain by the existence of some other clause or clauses elsewhere in the leases that may involve an ambiguity or inconsistency. To put it another way, the provisions

of the leases as a whole will not be construed to render ambiguous that which is clear and unambiguous.

The rule of construction was clearly set forth in the case of *Thornhill v. Hall*, 8 Bligh (n.s.) 88, 5 Eng. Rep. 879, 887 (Ch. 1834):

"It is a settled rule in the construction of instruments that, if an estate is conveyed, an interest given, a benefit bestowed, in one part, by clear, unambiguous, explicit words, upon which no doubt could be raised; to destroy or annul that estate, interest, or benefit, it is not sufficient to raise a mist and create a doubt from other terms in another part of the instrument. Possibilities, and even probabilities, will not avail. The terms to rescind or cut down the estate or interest before given, must be as clear and decisive as the terms by which it was created. If the benefit is to be taken away, it must be by express words or by necessary implication."

The rule so stated in the *Thornhill* case has been quoted with approval by this Court in *Evans v. Ockershausen*, 69 App. D.C. 285, 100 F.2d 695, 702 (1938).

On the basis of the foregoing authorities as well as the common sense interpretation of Continental's leases, it is evident beyond any reasonable question that the description in Continental's leases clearly shows that the lands leased are those described by metes and bounds; and there is nothing to be found elsewhere in the leases that can change or alter the plain import of the language in the description.

IV Circumstances Occurring After the Lease Sale

The Secretary, in his decision, relied in part upon circumstances occurring in the months following the lease sale⁴ as follows:

**** In the official boundary survey made by the Bureau of Land Management and approved May 10, 1954, the shortages in the distance between the north and south boundaries had to be put in the south tier of quarter sections because in an earlier official survey the township and section lines in the northeast part of the township had been surveyed and laid out."

Then, on page 3, after explaining the survey rules with respect to shortages and pointing out that, where conditions warrant, overages and shortages may be placed in the south end of a township, the Secretary goes on to say:

**** This was done in the instant case because it was desired to (1) provide a plan which would satisfy the basic laws on surveys and the established procedures of the Bureau of Land Management; (2) provide maximum regularity so that future subdivisional surveys of section, tract or lease boundaries would be facilitated; and (3) to give substantial compliance with the greatest number of tract boundaries which are described in detail and delineated in the Navajo lease sale advertisement."

⁴ There are some intimations in the record that Continental's rights are in some way affected by the Survey because the work on the ground was done before the Secretary approved and issued its leases on December 10, 1953. But the survey was not officially approved until May 10, 1954. In addition, the Secretary himself acknowledges in his opinion that the crucial date is the date of the lease sale and that "The dates of issuance could be no more than a matter of processing" (JA 45). In any event, the circumstances surrounding the survey involve extrinsic evidence whether before or after the execution of the leases and are not competent in construing the leases as is hereafter in this brief set forth.

Then, further on page 3:

"Prior to approval of the leases herein involved, a group of oil companies requested that a public land survey be made of the area by the Bureau of Land Management. Such survey was to be of township boundaries only, with section and quarter section corners established on the perimeter, but was not to include an interior section survey. This survey was undertaken by the Bureau of Land Management between August 7 and November 3, 1953, and it was pointed out in the preliminary discussions that with the township boundaries established, any private or company surveyor could locate wells and lease tract boundaries within such township. The oil companies, of which Continental was one, paid for the Bureau of Land Management survey."

These findings of the Secretary show various activities on the part of oil companies and officials of the Bureau of Land Management relating to the official Bureau of Land Management survey of the Navajo lands; but they disclose only one single fact that involves Continental. That fact is that Continental was one of the oil companies that paid for the survey. Such a circumstance simply is not sufficient to support the Secretary's construction of the leases as covering the "when surveyed" sections. The fact that Continental paid its share of the cost of the survey is of no probative force on the issue of whether Continental agreed that the metes and bounds description in its leases would be conformed to the "when surveyed" sections or on any issue of contemporaneous construction. For one thing, the Secretary's own record shows affirmatively that Continental did not at any time agree that its lease boundaries would be conformed to the "when surveyed" sections.

Continental's interest in having the survey made is easily explained by the fact that the survey would "facilitate subsequent identification" (JA 108) of its leases. As heretofore suggested on page 15, *supra*, it would

obviously be much easier and less expensive to survey out the courses and distances of its metes and bounds description with an official United States Geological Survey marker in close proximity to the point of beginning for the courses and distances shown by the metes and bounds description in its leases.

The other findings of the Secretary relating to the survey are not tied to Continental in any way whatever. They have to do, as already pointed out, with activities of departmental personnel. Toward the end of the quotation from page 3 of the Secretary's decision, there is the statement that "it was pointed out in the preliminary discussion that with the township boundaries established, any private or company surveyor could locate wells and lease tract boundaries within such township." This statement is utterly inconclusive. In the first place, it refers to the discussions as preliminary and negates any significance to these discussions as being of any binding effect. The finding does not show who took part in the discussions or in what way Continental was or could have been affected by them. Moreover, the conclusionary thought that any private surveyor could locate wells and lease tract boundaries once the township is established is just as consistent with locating metes and bounds boundaries as with "when surveyed" section lines. The facts set forth in the Secretary's decision are wholly lacking in developing any logical evidentiary basis for a legal conclusion of a contemporaneous construction of the leases by Continental as covering the "when surveyed" sections.

With regard to the fact that Continental first filed plats showing the section lines as indicated by the official survey, the Secretary's decision contains the following:

"That Continental recognized the propriety and legality of lease descriptions by sections which conform to the system of public land surveys is shown by its conduct in drilling its Davis

No. 1 Well. In December, 1956, having filed its survey plat showing sections, Continental applied for and was given permission to drill the Davis No. 1 Well. This well was a producer by March, 1957, and it was not until August, 1957, that Continental submitted its survey plat by metes and bounds, which would give it access to the 624-foot strip. Having once asserted a boundary line and acted in accordance therewith to its benefit, it is difficult to see how Continental can later claim a different boundary, particularly when it is in conflict with boundaries recognized as having been established by other lessees and acted upon by them". (JA 45)

There is absolutely nothing in this statement of the Secretary to substantiate his construction of Continental's leases. However, the statement carries an insidious implication that somehow Continental gained some drilling advantage by filing the section plats. This is misleading because the metes and bounds plat later filed by Continental covered the same land plus the 300 acre strip. Therefore, the same drilling that was done on the basis of the section plats could also have been done on the basis of the metes and bounds plat.

The filing of the section plats in December, 1956, was not contemporaneous with the lease sale which occurred on May 1, 1953. Within a matter of months a metes and bounds plat was filed, and such plat has remained on file ever since. The situation is little different than that which might arise when a landowner, three or four years after receiving his deed, files an erroneous plat or builds a fence a few feet within his property line as described in the deed. Would such a circumstance divest him of the title conveyed by the deed, particularly if the mistake was corrected within a few months?

The Secretary brushes aside the one circumstance after the lease sale that is of genuine significance in determining the construction of the leases by the parties hereto. That circumstance is the fact that Continental paid the rental on its leases on the basis of the metes

and bounds description, and this rental so paid was accepted year after year by the Tribe (JA 45). The Secretary dismisses this circumstance by saying that it could have no bearing on Phillips-Aztec in the present boundary dispute (JA 45). But the Secretary's decision is not based on a boundary dispute but on the construction of Continental's leases. The lower court held that on the ground of the Secretary's decision, Continental's leases "conveyed land in terms of section descriptions." We do not need in this brief to go into the law with respect to boundary disputes because neither the defendant Secretary nor the Intervenor have ever contended that the issue here involved is one that has been resolved by a boundary agreement between Continental and Phillips-Aztec. And, if such a contention were made, it would be utterly unjustified and unwarranted because there is absolutely nothing in the record to support such theory.

In discussing these circumstances occurring after the lease sale, we have not intended to concede that they constitute competent evidence in construing Continental's leases. We have discussed them for the purpose of pointing out that they in no way support the conclusion reached by the Secretary. These circumstances, however, are not competent evidence in construing Continental's leases and should not have been considered at all by the Secretary in reaching his decision. This is because the metes and bounds description in Continental's leases is, as we have already pointed out, clear and unambiguous. The cases and text writers are unanimous that a description that is clear and unambiguous cannot be set aside by parol proof of the acts of the parties either before or after the execution of the instruments. 6 *Thompson on Real Property*, § 3279, Page 453 (Perm. Ed. 1940):

"What is the practical construction given to a doubtful description by the subsequent acts of the parties may be proved by parol evidence; but a description which is clear and unambiguous cannot be set aside and a different one substituted in

its place by parol proof of the acts of the parties, either before or after the execution of the deed.

***11

Millers' Mut. Fire Ins. Ass'n. v. Warroad Potato Growers Ass'n., 94 F.2d 741 (8th Cir. 1938); *Westinghouse Electric & Mfg. Co. v. Tri-City Radio Electric Supply Co.*, 23 F.2d 628 (8th Cir. 1927); *Andrews v. St. Louis Joint Stock Land Bank*, 107 F.2d 462 (8th Cir. 1939); certiorari denied 309 U.S. 667, rehearing denied 309 U.S. 697 (1940); *W. P. Brown & Sons Lumber Co. v. Louisville & N.R. Co.*, 82 F.2d 94 (6th Cir. 1936), affirmed 299 U.S. 393 (1937); *Dant & Russell v. Grays Harbor Exportation Co.*, 26 F. Supp. 784 (W.D. Wash. 1939), affirmed 106 F.2d 911 (9th Cir. 1939), 125 A.L.R. 1302; *Walter Kidde & Co., Inc. v. Walton-Viking Co.*, 153 F.2d 988 (8th Cir. 1946), certiorari denied 329 U.S. 715 (1946).

V.

Interoffice Communications, Briefs, and the Transcript of the Arguments of the Parties Are Not Properly Part of the Administrative Record for Review

At the trial, Continental objected to the inclusion in the administrative record of briefs, the transcript of the oral argument before the Secretary, and interoffice communications within the Department of the Interior on the grounds that such material is not properly part of the administrative record. The theory of Continental's objections is well stated in *Norris & Hirshberg v. Securities and Exchange Commission*, 85 App. D.C. 268, 163 F.2d 689, 693 (1947), certiorari denied 333 U.S. 867 (1948):

"In considering a case such as this the Commission might have before it four sorts of documents: the pleadings, a transcript of the evidence, briefs of counsel, and memoranda prepared by members or subordinates. It is well established

that only the pleadings and the evidence constitute the record upon which the decision must be based. Briefs and memoranda made by the Commission or its staff, are not parts of the record. Our duty on appeal, being only to say whether the record justifies the order, is therefore only to examine the pleadings and the evidence. What may be said by counsel in their briefs, or by a commissioner or a subordinate in a memorandum concerning the record, does not properly come before us."

See also, *National Labor Relations Board v. Crown Can Co.*, 138 F.2d 263 (8th Cir. 1943), certiorari denied 321 U.S. 769 (1944); *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Company*, 308 U.S. 241 (1939); *United Gas Improvement Co. v. Securities and Exchange Commission*, 138 F.2d 1010 (3rd Cir. 1943).

It is, of course, recognized that an administrative tribunal may conduct its own independent investigation of facts relating to a matter in reaching a decision on any matter that comes before it for adjudication. Facts developed pursuant to such an investigation may be considered in reaching its decision. Facts so developed must, however, be made available to the parties to the proceeding in order that they may have an opportunity to respond. If this is not done, such material is not properly a part of an administrative record for a court of review. This principle is authoritatively set forth in Kenneth Culp Davis, *Administrative Law* (1951), page 519:

"The cardinal principle of fair hearing is not that all facts must be in the record or that all facts must be subject to cross-examination but that parties must have a chance to meet in the appropriate fashion all materials considered."

The United States Supreme Court recognized this principle of fairness in *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U.S. 88, 93 (1913):

"All parties must be fully apprised of the evidence submitted or to be considered and must be

given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

The record before this Court contains certain documents reflecting some kind of independent investigation by the Secretary. One of these is the letter of July 31, 1958, to the Commissioner, Bureau of Indian Affairs, from G. Warren Spaulding, General Superintendent, with various enclosures. The enclosures include the letter of July 3, 1958, from G. Warren Spaulding to John A. Anderson, Supervisor, United States Geological Survey, wherein reference is made to the intent of "this Agency," which letter has already been commented upon herein, *supra*, page 12. Another is a document captioned Statement of Facts by the Mineral Section, Branch of Realty, Bureau of Indian Affairs, dated December 12, 1958. With respect to this document, Continental respectfully calls the Court's attention to the following:

(a) The statement is unsigned, and the only reference to authorship is at the end of the statement where there appears the words "ASWyner:db"

(b) In the letter transmitting this document to the Secretary from the Acting Deputy Commissioner, Fred H. Massey, dated January 2, 1959 (JA 113), this document is characterized as "indicating Continental's acceptance of the tracts as described by public lands survey." This is merely a conclusion or opinion not based upon any basic facts but based upon argumentative comment appearing in the Statement of Facts such as "The conditions given under the surveying instructions *** were accepted by the various oil companies with the payment of their proportionate share of the costs" (JA 107). Such a conclusion is utterly without substantiation in the record. The motives of the oil companies in paying for the official survey are entirely immaterial although it is obvious that such a survey would facilitate the location of lease boundaries whether by section lines

or by metes and bounds. To infer anything more is unwarranted and contrary to the facts in the record.

(c) This Statement of Facts contains a number of other inferences which are neither supported by nor warranted by the facts, such as that the request for the survey by the oil companies was made because of variance in the Lease Sale Advertisement No. 41, dated March 24, 1953 (JA 103).

(d) This so-called Statement of Facts makes reference to "General notes of Meeting of Oil Company Representatives," the "Navajo Indian Survey Committee," and to the "Chairman" of this committee. There are no findings or evidence of any kind to show the authority of this committee, or the authority of its chairman, or the rules, if any, under which it operated. There is no indication of who prepared the general notes referred to or whether the various oil companies in any way agreed to or were bound by such notes.

(e) The statement refers to matters which were discussed with the chairman of the committee without any evidence of the authority of the chairman to bind or commit the oil companies to any agreement or arrangement.

We respectfully submit that Continental's objections to the inclusion in the administrative record of briefs, the transcript of oral argument, and interoffice communications were well taken.

CONCLUSION

For the foregoing reasons, appellant submits that the construction of appellant's leases by the Secretary of the Interior was arbitrary, capricious and contrary to law; and that this is true whether consideration is confined to the provisions of the leases or includes all matters contained in the administrative record submitted to the court.

Therefore, appellant requests that the judgment below be reversed.

Respectfully submitted,

CONTINENTAL OIL COMPANY

McIntosh & McDade

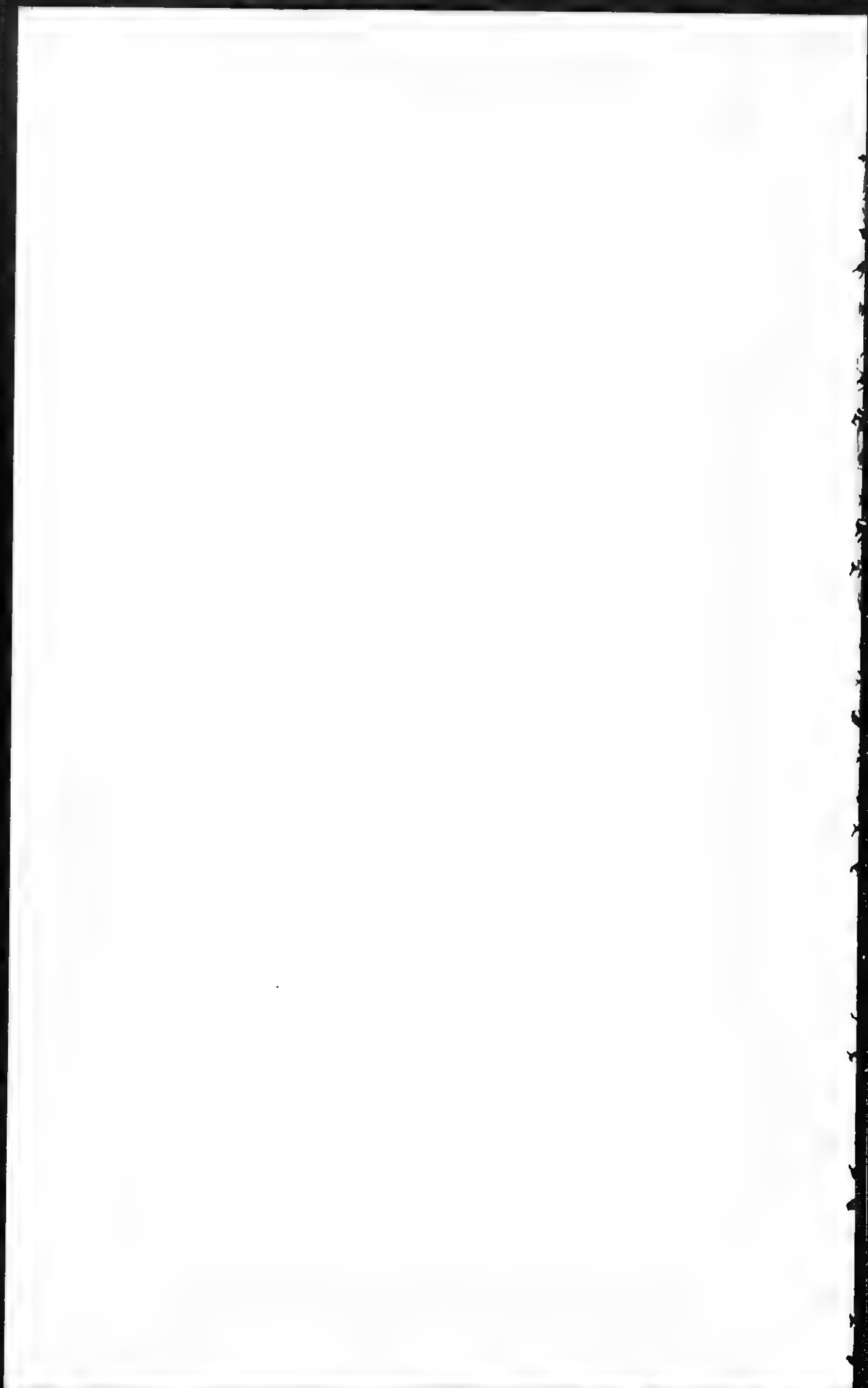
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APPENDIX "A"

SYLLABUS - A metes and bounds description of unsurveyed land is prevailing over a description thereof on a "when surveyed" basis.

Where lands not applied for are erroneously included in a lease, the lease, insofar as it embraces such erroneously included lands must be cancelled. If lands are erroneously omitted from a lease, the lease offeror is entitled to inclusion of those lands in a lease pursuant to and in accordance with 43 CFR 192.42(j).

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

Utah 018343
March 12, 1958

DECISION

C. S. McGhee : Oil and Gas

Action of Manager Affirmed as Modified
Case Remanded for Further Processing

The Manager, Land Office, Salt Lake City, Utah, by decision dated October 29, 1956, rejected in part the non competitive oil and gas lease offer of C. S. McGhee. The offer was filed pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 226). The decision stated that "The enclosed lease embraces the remainder of the land applied for." Simultaneously with the promulgation of that decision the Manager issued a lease for the lands described in the lease offer which

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were then available for leasing. From the Manager's decision it would appear that certain lands applied for, although available for leasing, were not included in the lease. Mr. McGhee, to insure inclusion in his lease of the maximum acreage possible of the lands applied for, has appealed to the Director, Bureau of Land Management.

The appellant's lease offer described certain tracts of unsurveyed lands by metes and bounds; the lands were also described by legal subdivisions on a "when surveyed will probably be described as" basis. The rejection described lands embraced in conflicting leases also on a "when surveyed" basis. The appellant does not dispute the findings of conflict and his appeal is not directed to those findings.

The Manager noted that lands which he described as the S1/2SW1/4 sec. 23, and N1/2NW1/4 sec. 24, T. 30 S., R. 18 E., S.L.M., Utah, were in conflict with lands embraced in lease Utah 017236. A review of the records discloses that the lands sought to be identified were erroneously described. The lands should have been described as the S1/2SE1/4 sec. 23 and the S1/2NW1/4 sec. 24, same township and range. The Manager's decision of rejection is, accordingly, modified to this extent.

The appellant, when platting the lands applied for apparently assumed that the NE and SE corners of proposed T. 30 S., R. 18 E., would be coincidental with the NW and SW corners of T. 30 S., R. 19 E.; he described the desired lands by a mere platting on a plan of survey projected from those corners. However, in the proposed survey of T. 30 S., R. 18 E., the NE and SE corners are 1-3/4 miles north of the aforescribed points. Thus, it is clear that if the subdivisional method were used to describe the lands without recourse to the metes and bounds description, the lands described by the appellant would be entirely different from those described by the Manager.

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Since a metes and bounds description is controlling over a "what will be when surveyed" description, the Manager correctly attempted to plat the lands applied for by the appellant on accepted charts and maps of the Bureau; he adjusted the descriptions of the lands when the lands so platted were in conflict with existing leases. He then issued a lease describing the lands therein contained by metes and bounds; the lands embraced in the lease were further identified on a "what will be when surveyed" basis, according to the latest proposed plat of survey. The lands included in the lease, except as hereafter indicated and described, and described by the Manager both by metes and bounds and by proposed legal subdivisions, are the identical lands applied for, except as hereafter excepted, and which were available for lease.

The appellant applied for a parcel of land described in his lease offer as follows:

"*** an unsurveyed tract of land described as beginning at the Northwest corner of Lot 1, Section 30, Township 30 South, Range 19 East, thence South 1 mile, thence West 1 mile, thence North 1 mile, thence East 1 mile to the point of beginning ***."

The Manager erroneously platted these lands on the Bureau's charts of proposed plan of survey. When including them in the lease issued to the appellant he described these lands as follows:

T 30 S., R. 18 E., S.L.M., Utah
sec. 25, S1/2S1/2 (fractional)
sec. 36, N1/2, N1/2S1/2 (fractional).

When the aforescribed lands are properly platted they would be described "when surveyed" as follows:

T. 30 S., R. 18 E., S.L.M., Utah
sec. 36 S1/2S1/2 (fractional)
T. 31 S., R. 18 E., S.L.M., Utah
sec. 1 N1/2, N1/2S1/2 (fractional)

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Since the appellant did not apply for the described S1/2 S1/2 sec. 25 and the N1/2, N1/2S1/2 sec. 36, his lease, insofar as it embraces those lands is cancelled. Proper adjustments, including amendments of the metes and bounds description as contained in the lease, and necessary notations of the cancellation on the records of the land office, will be made by the land office.

If the appellant was the first person to file a proper application for the lands omitted from the lease, and if a lease is to be issued for those lands, he is entitled to a lease for those omitted lands, provided the omission of the lands from the lease was erroneous. Cf. C. T. Hegwer, 62 I.D. 77 (1955). Supplemental lease for those lands would be in order in accordance with 43 CFR 192.-42(j).

In view of the foregoing, the actions of the Manager are affirmed, as modified above.

When this decision becomes final the case records will be returned, through the Bureau's State Supervisor at Salt Lake City, for such further processing and adjustments as are indicated by this decision.

C. B. McGhee is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a \$5.-00 filing fee. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D.C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, con-

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tained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

/s/ Edward Woosley
Director

SYLLABUS - A lease for unsurveyed lands must describe the lands applied for by metes and bounds. Though a metes and bounds description has been defined on a "what will be when surveyed" basis, the metes and bounds description is controlling.

Where the Manager improperly platted lands sought for leasing, and amended the description of the applied for lands in terms of the erroneous platting thereof, the records will be remanded for proper platting and lease description.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Anchorage 028805
June 19, 1958

Certified Mail
Return Receipt Requested

DECISION

Jacob Gordon : Oil and Gas

Manager's Decision Modified
Case Remanded

Jacob Gordon has appealed to the Director, Bureau of Land Management, from a decision of the Manager, Land Office, Anchorage, Alaska, dated April 25, 1956, reject-

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ing in part his noncompetitive oil and gas lease offer, Anchorage 028805, filed January 14, 1955, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed. sec. 226). The offer was rejected for so much of the lands applied for as were found to be embraced in a lease, Anchorage 027833, issued to George Hooker, effective February 1, 1955, pursuant to an offer filed December 7, 1954.

The appellant's lease offer described 2560 acres. Pursuant to that offer, lease Anchorage 028805 was issued effective April 1, 1956; it embraces 1600 acres. The appellant contends that an additional 320 acres was available for leasing but was erroneously omitted from his lease because of erroneous inclusion thereof in the Hooker lease. This error, he argues, resulted because the Manager improperly "shifted" leasehold Anchorage 027833 to include other lands than those applied for. He submits that the error in platting may have been occasioned by platting lands in lease offers or leases, not by metes and bounds as required by the regulations, but by improperly describing and identifying lands on a "when surveyed" basis.

Both the Hooker and Gordon lease offers described the lands applied for by metes and bounds in accordance with pertinent regulation, 43 CFR 192.42(d) and 71.2. It is the metes and bounds description which is controlling in ascertaining and identifying lands sought for leasing. Any reference to lands in the issued leases or the decision appealed from by means of a "when surveyed" basis is solely for ease in platting and identification on the maps and plats of the Bureau. If these "when surveyed" descriptions identify lands other than those embraced within the metes and bounds descriptions, the metes and bounds descriptions are controlling. See Director's decision, Hazel Rushmore et al., Anchorage 024940, etc., November 15, 1957.

Upon review of the metes and bounds descriptions in

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these lease offers and leases, it is apparent that an additional 320 acres was embraced within lease offer 028805 but that is not due to elimination from conflict with 027-833.

Basically, the difference is the result of an error in determination of lands included in offer and lease 028805. The beginning point of this offer is described as being 62 miles East and 6 miles North of the Northwest corner of sec. 30, T. 21 S., R. 18 E., C.R.M. The Manager found, in effect, that this point of beginning was three-fourths of a mile West of the West boundary of lands embraced in lease 027833; actually that point of beginning is one mile West of the West boundary of that lease. In terms of the future survey, the point of beginning of 028805 was considered as being at the corner of secs. 19, 20, 29, and 30, T. 20 S., R. 28 E., C.R.M.; actually that point should be considered as being at the East 1/16 section corner, secs. 19 and 30, T. 20 S., R. 28 E.

As a result of that mislocation of the point of beginning, the following lands in terms of the future survey, were not included in the lease under 028805 although embraced within the lease offer:

E1/2E1/2 sec. 19, T. 20 S., R. 28 E.

E1/2E1/2 sec. 13, T. 20 S., R. 27-1/2 E.

Lease offer 028802 has the same point of beginning as 028805 and it is apparent that the same error of location was made in the lease issued under 028802. The additional lands mentioned above as having been included in lease offer 028805 are described as being in lease 028-802.

Accordingly, the Manager's decision is modified as above. When this decision becomes final the case records will be remanded through the Bureau's Operations Supervisor at Anchorage, Alaska, for such amendments of lease descriptions as is indicated by this decision, and for further appropriate processing of a request for

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approval of assignment of the subject lease from the appellant to Page C. Jett.

Mr. Gordon is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

/s/ Edward Woozley
Director

SYLLABUS - An attempted amendment of an oil and gas lease offer which substitutes other lands for those applied for originally must be processed as a new filing.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

Fairbanks 016136
September 17, 1958

Certified Mail
Return Receipt Requested

DECISION

Alberta Link : Oil and Gas

Decision Affirmed, as Modified

Mrs. Alberta Link has appealed from a decision dated March 7, 1958, rejecting her oil and gas lease offer ^{1/} for the reason that the metes and bounds description of the lands sought for lease conflicted totally with the what-

^{1/} Submitted under the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 226).

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will-be-when-surveyed, probable legal subdivision, description, also supplied in the lease offer. Mrs. Link states she made a typographical error in the metes and bounds description supplied in her lease offer in that the point of beginning should have read 28 miles south rather than 30 miles south. By such correction, which she contends was accomplished through her telegram of March 11, 1958, to the Land Office, she states the metes and bounds description and the probable legal subdivision description agree.

The record shows her lease offer as filed originally on October 4, 1957, described unsurveyed lands by metes and bounds and denoted that these lands when surveyed would probably be secs. 29, 30, 31 and 32 T. 5 S., R. 4 W., S.M., Alaska. However, from the metes and bounds description furnished, the lease offer in fact, covered secs. 5, 6, 7 and 8, T. 6 S., R. 4 W., S.M., Alaska. The offeror's telegram to the Land Office requested the metes and bounds description in the offer be corrected to read 28 miles south rather than 30 miles south, to conform to the probable legal subdivisions shown in the original offer. In response thereto the Land Office advised the offeror that "corrected applications in quintuplicate" were necessary. The offeror did not resubmit her offer, but she submitted her appeal, in quintuplicate, referring therein to the telegram request above referred to.

The record shows oil and gas lease offer Fairbanks 017342 was filed by R. A. Hildebrand, P. O. Box 1674, Grand Junction, Colorado, on December 31, 1957 for the lands described by probable legal subdivisions in the original Link offer (and included in the amended metes and bounds description attempted by Mrs. Link,) and a lease was issued pursuant thereto as of March 1, 1958.

Since a metes and bounds description is controlling over a what-will-be-when-surveyed-description of unsurveyed lands (see Director's decision, Hazel Rushmore et al., Anchorage 024940 etc., November 15, 1957),

the Manager should not have rejected the lease offer for an apparent conflict between these descriptions. The original offer was not fatally defective on this account. Nor may an offeror substitute a new metes and bounds description for that included in his original offer where the metes and bounds description first supplied was insufficient to identify the lands. An offeror may accomplish such a change only through the filing of a completely new offer. Transfer of the filing fee and rental to another offer is authorized only as provided in the regulations (43 CFR 192.42(g)(1)). Consequently, at most the purported amendment of the lease offer could only have the effect of a new lease offer, and since no filing fee or rental was paid, this offer was subject to rejection under the pertinent regulation (43 CFR 192.42) which provides:

"(g)(1) Except as provided in subparagraph (2) of this paragraph, an offer will be rejected and returned to the offeror and will afford the applicant no priority if: (iii) The full filing fee and the first year's rental do not accompany the offer ***."

Accordingly, the purported amendment must be rejected and the offer remains as one describing unsurveyed lands in T. 6 S., R. 4 W., S.M., Alaska, which when surveyed will probably be secs. 5, 6, 7 and 8. If the offeror is not interested in securing a lease of these lands, she should withdraw her offer. Otherwise, when this decision becomes final, the record will be returned to the Land Office for further processing of the lease offer, looking to issuance of a lease of these lands, all else being regular.

There is no reason apparent for disturbing the lease Fairbanks 017342 which was issued to Mr. Hildebrand. The first qualified applicant for land available for oil and gas leasing has a statutory right to a lease, if a lease is to be issued for the land, which must be honored. C. T. Hegwer, et al., 62 I.D. 77 (1955). However, if a lease is issued to the appellant as stated in the preced-

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ing paragraph, the lease Fairbanks 017345 involving these lands, which was issued to Mr. Hildebrand in contravention of the statutory preference right of the appellant as prior applicant therefor, should be cancelled by the Land Office. 43 CFR 192.42(m).

The Land Office decision is modified to conform with the rulings herein.

Mr. Link is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Alberta Link, then the adverse party to be served is:

Mr. R. A. Hildebrand
P. O. Box 1674
Grand Junction, Colorado

/s/ Edward Woozley
Director

SYLLABUS - Descriptions - Alaska

(K.E.B.) Metes and bounds descriptions are controlling over "when surveyed" description contained in the same offer.

If a metes and bounds description is valid on its face it may not be corrected to conform to the "when surveyed" description. Any correction must be filed as a new offer.

Descriptions in offers to lease in Alaska should proceed from the initial point north to south first, thence east or west, to avoid error from offset caused by the convergence of meridians.

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Fairbanks Land Office
Box 1050
Fairbanks, Alaska

March 4, 1959

Air Mail
Certified Mail
Return Receipt Requested

DECISION

Ed M. Catron	:	Oil and Gas
113 West 25th Street	:	Fairbanks 017592
Casper, Wyoming	:	

Protest Dismissed

On January 14, 1958, this office received an offer to lease for oil and gas which contains the following description in block 2:

"An unsurveyed Tract described as follows: From a point which is 408 miles West and 48 miles North of the initial point of the Seward Meridian; thence North a distance of 6 miles to the point of beginning;
Thence North a distance of 2 miles;
Thence East a distance of 2 miles;
Thence South a distance of 2 miles;
Thence West a distance of 2 miles to the point of beginning; which Tract, when surveyed, will be described as follows:

Twp. 10 North - Rge. 68 West of Seward Meri-
dan All of Sections 29, 30, 31 & 32 containing
2560 acres"

On December 22, 1958, this office issued a lease effective January 1, 1959 pursuant to the said offer. Block 3 of the lease contains, in pertinent part, the following:

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"This lease embraces the area and the land described in Item 2."

"What will be when surveyed: W1/2 Sec. 26, Sec. 27, E1/2 Sec. 28, E1/2 Sec. 33, Sec. 34, W1/2 Sec. 35, Township 10 North, Range 67 West, Seward Meridan, Total Area 2560 acres."

On February 16, 1959 this office received a letter of protest from the lessee as follows:

"Your attention is directed to the oil and gas lease issued to the undersigned by your office under date of January 1, 1959, and particularly to the description contained in the issued lease. This description does not coincide with the description set forth in our offer to lease nor does the revised description cover land in which the offeror is interested in acquiring a lease. A photo copy of the issued lease is attached.

"We cannot understand why the lease issued on lands other than those upon which our offer was made. The description shown in the issued lease is located some six and one-half miles east of the land covered by our offer. The sectionized description contained in the issued lease is not even in the same projected township as the description set forth in the lease. If the description used in our offer was in any erroneous [sic] or if it did not clearly state the description of the lands desired then should we not have had the opportunity to correct such description as soon as such filing was processed?

"Further we cannot understand why the description contained in our offer bearing the above serial number while those bearing Fairbanks-017593 and 017594 covering lands just north of 017592 were issued without alteration. [sic]

"We protest the issuance of Fairbanks-017592 on the lands described in the copy furnished us and

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respectfully request that such description be corrected to reflect the description set forth in our offer."

This decision will consider each separate part of the letter of protest.

The description in the issued lease coincides exactly with the description set forth in the offer as evidenced by the statement in block 3 that the lease embraces ". . . the land described in Item 2". The metes and bounds description, which is controlling, appears to be complete and proper on its face. The status on the plat was plotted exactly as described in the offer, that is, it was first plotted west 408 miles and then north 48 miles to the point of beginning. Although, it is recognized that due to the convergence of meridians, a different area would have been described, had the offer been plotted north first and then west; to do so would have been contrary to the precise language in the offer. A lease for a tract of land other than that described in the offer would have been void.

In the case of Jacob Gordon, Anchorage 028805, June 19, 1958, the Bureau ruled that the metes and bounds description is controlling and that any reference to lands by means of a "when surveyed" description is solely for ease in platting and identification on the maps and plats of the Bureau.

In another case (Alberta Link, Fairbanks 016136, September 17, 1958) the decision of this office acting on the discrepancy between the "when surveyed" and the metes and bounds descriptions rejected the offer on the ground that the conflict in the two descriptions made it too indefinite to constitute a valid offer. The Bureau reversed and remanded the decision of this office holding that the metes and bounds description is controlling.

In the same Link case the Bureau also ruled that any attempted amendment of the original offer which sub-

stitutes lands other than those applied for must be processed as a new filing. Therefore, since the metes and bounds description was valid on its face, it was not possible to correct that description.

The descriptions in leases Fairbanks 017593 and 017-594 are in accordance with the applicant's expectations because the courses proceed north from the initial point and then west, and not west and then north as in Fairbanks 017592. The difference in the location of the leases was caused by wording of the descriptions in the offers.

For the future to avoid any error that may result from the offset caused by the convergence of meridians and to conform with what is intended to be described in a "when surveyed" description Offer to Lease for Oil and Gas:

First proceed from the initial point (north or south, whichever is appropriate) to the standard parallel south of and nearest to the offer.

Then proceed along that standard parallel (east or west, whichever is appropriate) to a point directly south of a corner of the tract of land intended to be described.

Then proceed north to the southeast or the southwest corner of the tract (whichever is appropriate). This is the point of beginning of the land intended to be described.

Then proceed to describe the exterior boundaries of the land intended to be described by courses and distances, making certain that the description closes at the point of beginning.

Pursuant to the foregoing the request to change the metes and bounds so that it conforms with the "when surveyed" description must be denied. The protest is accordingly dismissed.

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The right of appeal to the Director, Bureau of Land Management, is allowed in accordance with information in enclosed Form 4-1366 made a part hereof, and the regulations contained in Form 4-1364, a copy of which is also enclosed.

/s/ D. B. Leightner
Acting Manager

SYLLABUS - Lands Available for Leasing - Conflicting Descriptions - Partial Rejection and Cancellation.

The partial rejection of an oil and gas lease application and the partial cancellation of oil and gas leases are proper as to unsurveyed lands which, according to determinations of the Cadastral Engineering Officer, based upon the applicants' descriptions of the land, conflict with leases issued pursuant to prior offers.

Where a lease is issued on unsurveyed land pursuant to an application which partially conflicted with a prior lease and the subsequent lease omitted part of the land applied for which did not conflict with the prior lease, thus creating a hiatus between the two leases, and where the hiatus can be closed by adding to the description in the subsequent lease a metes and bounds description of the land in the hiatus, the subsequent lease will be so amended. Where leases for unsurveyed land partially conflict with outstanding leases based upon prior offers and the conflicts can be eliminated by excepting the area in conflict from the descriptions in the subsequent leases,

the subsequent leases are properly canceled as to the area in conflict by excepting that area from the lands included in the subsequent leases.

Oil and gas lease applications for unsurveyed lands will not be suspended pending actual survey to establish whether a portion of the lands applied for conflicts with prior offers where determinations based upon the applicants' descriptions of the land show such conflict and there is no evidence that the conflict does not exist.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-28294

Decided June 28, 1960

Waring Bradley

A-28318

James M. Snowden

- : Fairbanks 017909, 017423, 017427
- : Oil and gas leases canceled in part;
oil and gas offer rejected in part.
- : Affirmed and remanded.

APPEAL FROM THE BUREAU OF
LAND MANAGEMENT

Waring Bradley has appealed to the Secretary of the Interior from a decision of October 23, 1959, by the Director of the Bureau of Land Management which, in effect, affirmed the partial rejection of Bradley's oil and gas lease offer Fairbanks 017909 and remanded the case to the Fairbanks land office for adjustment of the lands to be included in a lease issued pursuant to the offer. James M. Snowden has appealed to the Secretary from a decision of November 20, 1959, by the Acting Director

of the Bureau which affirmed, with modification, the partial cancellation of Snowden's oil and gas leases, Fairbanks 017423 and 017427. Bradley's offer and Snowden's leases cover unsurveyed lands in Alaska which were described by metes and bounds in their applications. The appeals are being decided together because they require determination of the same questions regarding descriptions of unsurveyed lands.

Bradley's application was rejected by the manager for partial conflict with an outstanding lease, Fairbanks 017352, issued to James Noel as of March 1, 1958. A lease was issued to Bradley effective February 1, 1959, for the lands not in conflict with Noel's lease, which lands, according to the Manager, amounted to approximately 1,920 acres for which Bradley applied.

Snowden's leases, each covering 2,560 acres, were issued as of March 1, 1958. By decisions of January 20, 1959, the manager of the Fairbanks office held each of the leases for cancellation as to 640 acres because of conflict with prior lease offers filed by J.G. Taylor pursuant to which leases Fairbanks 017340 and 017334 were issued.

The manager's partial rejection of Bradley's offer and partial cancellation of Snowden's leases were modified by the Director's and Acting Director's decisions by amending the amount of land for which Bradley's application was rejected and the amount of land for which Snowden's leases were canceled. The Director and Acting Director found that the manager had rejected Bradley's offer and canceled Snowden's leases for more than the areas in conflict, thus leaving a hiatus between the conflicting offer and leases. The Director and Acting Director remanded the cases for adjustment of the Bradley and Snowden leases to include the areas not in conflict.

Bradley and Snowden contend that the determination of the areas between their offers and the conflicting leases

is the result of a theoretical calculation based upon an unsound assumption that the location of the lands can be established without an actual survey on the ground. They point to the fact that the descriptions in their offers are tied to a monument which is over 200 miles distant from the monument to which the descriptions in the conflicting leases are tied and assert that the question of whether there is an actual conflict between their offers and the Noel and Taylor leases can only be established by actual survey. They conclude that action on their offers and leases should be suspended as to the parts claimed to be in conflict until an actual survey is made on the ground which will determine the precise areas, if any, in conflict.

Oil and gas leases on unsurveyed public lands cover only that area of land which is identifiable by the metes and bounds description in each lease. The boundaries of the lands described in the appellants' offers and in the conflicting leases are, of course, determined by courses and distances from the permanent monuments named in the respective offers or leases, and the extent of conflict between offers is established by delineating the land described in each offer after plotting its location in relation to the permanent monument to which the description is tied. The position for the starting points of the land described in each of the appellants' offers is based upon Triangulation Station "Hook". The land descriptions in each of the conflicting leases give starting points based upon Border Monument 106.

The cases have again been reviewed by the Cadastral Engineering Office of the Bureau of Land Management. That office is of the opinion that the precise areas of conflict between the offers and leases involved can be accurately described without the necessity of an actual survey on the ground. In a memorandum of June 3, 1960, the Cadastral Engineering Staff Officer describes the hiatus between Bradley's and Noel's leases with refer-

of the Bureau which affirmed, with modification, the partial cancellation of Snowden's oil and gas leases, Fairbanks 017423 and 017427. Bradley's offer and Snowden's leases cover unsurveyed lands in Alaska which were described by metes and bounds in their applications. The appeals are being decided together because they require determination of the same questions regarding descriptions of unsurveyed lands.

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The manager's partial rejection of Bradley's offer and partial cancellation of Snowden's leases were modified by the Director's and Acting Director's decisions by amending the amount of land for which Bradley's application was rejected and the amount of land for which Snowden's leases were canceled. The Director and Acting Director found that the manager had rejected Bradley's offer and canceled Snowden's leases for more than the areas in conflict, thus leaving a hiatus between the conflicting offer and leases. The Director and Acting Director remanded the cases for adjustment of the Bradley and Snowden leases to include the areas not in conflict.

Bradley and Snowden contend that the determination of the areas between their offers and the conflicting leases

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Oil and gas leases on unsurveyed public lands cover only that area of land which is identifiable by the metes and bounds description in each lease. The boundaries of the lands described in the appellants' offers and in the conflicting leases are, of course, determined by courses and distances from the permanent monuments named in the respective offers or leases, and the extent of conflict between offers is established by delineating the land described in each offer after plotting its location in relation to the permanent monument to which the description is tied. The position for the starting points of the land described in each of the appellants' offers is based upon Triangulation Station "Hook". The land descriptions in each of the conflicting leases give starting points based upon Border Monument 106.

The cases have again been reviewed by the Cadastral Engineering Office of the Bureau of Land Management. That office is of the opinion that the precise areas of conflict between the offers and leases involved can be accurately described without the necessity of an actual survey on the ground. In a memorandum of June 3, 1960, the Cadastral Engineering Staff Officer describes the hiatus between Bradley's and Noel's leases with refer-

ence to the initial point in the description of the land covered by Bradley's lease as follows:

"Thence North 2 miles to a point, thence East 2415 feet to a point, thence South 130 feet to a point on north boundary of O and G 017352, thence West along said boundary 1290 feet to a point, thence South along said boundary 10430 feet to a point, thence West 1125 feet to the initial point. Area, 276.58 acres."

If this description is added to the description of the land leased to Bradley, his lease will include all of the land described in his offer which was available for leasing when the offer was filed and there will be neither an overlap nor a gap between his and Noel's leases as defined by the metes and bounds descriptions in the respective leases.

A memorandum of June 13, 1960, by the Cadastral Engineering Staff Officer identifies the areas in conflict between Snowden's and Taylor's leases (which areas are to be eliminated from Snowden's leases) by metes and bounds descriptions tied to the descriptions in Snowden's offers. The memorandum of June 13 indicates that the conflict between Fairbanks 017423 and 017340 will be eliminated by excepting from the area described in Fairbanks 017423 the following tract of land:

"Beginning at the initial point described in this lease offer, thence west 960 feet to the west boundary of Lease 017340, thence north 10,350 feet along the west boundary of Lease 017340, thence east 960 feet, thence south 10,350 feet, to the point of beginning, containing 228 acres."

Likewise, the conflict between 017427 and 017334 will be eliminated by excepting from tract 1 of the area described in offer 017427 the following parcel:

"Beginning at a point on the west boundary of Lease 017334 which is 4,320 feet east of the initial point

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described in this lease offer, thence north 10,350 feet along the west boundary of Lease 017334, thence east 960 feet, thence south 10,350 feet, thence west 960 feet to the point of beginning, containing 228 acres."

Since these descriptions of the areas in conflict are tied to boundaries of the conflicting leases, the appellants cannot complain of the omission of any areas to which they are entitled under their offers. Accordingly there is no reason to suspend any action on their offers and leases to await indefinitely a survey of the leased areas on the ground. The cases can and will be remanded for appropriate action to give the appellants all the lands included in their offers except as to the areas in conflict.

In Bradley's case, the gap which was left between Bradley's lease as issued and Noel's lease will be closed if the 276.58 acres described by metes and bounds with reference to the initial point in the description in Bradley's lease and quoted herein is added to Bradley's lease. The description is contained in the memorandum of June 3, 1960, by the Cadastral Engineering Staff Officer and the case will be remanded for including the 276.58 acres in Bradley's lease.

In Snowden's case, the two 228-acre tracts described with reference to the initial points in Snowden's offers 017423 and 017427 and quoted herein are excepted from the land descriptions in those offers, the conflict between Snowden's and Taylor's leases will be eliminated. The description of the land to be excepted from Snowden's leases is set forth in the memorandum of June 13, 1960, by the Cadastral Engineering Staff Officer and the cases will be remanded for excepting from Snowden's lease offers only the areas which conflict with Taylor's leases.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A

(4)(a), Departmental Manual; 24 F.R. 1348), the decisions by the Director and the Acting Director of the Bureau of Land Management are affirmed and the cases are remanded to the Bureau for further action in accordance with this decision.

GEORGE W. ABBOTT
The Solicitor

By: /s/ Edmund T. Fritz
Deputy Solicitor

NON-COMPETITIVE OIL AND GAS LEASE APPLICATIONS AND LEASES ON UNSURVEYED PUBLIC LANDS WITHIN THE UNITED STATES UNDER THE MINERAL LEASING ACT OF FEBRUARY 25, 1920, AS AMENDED

SYLLABUS - Mineral Leasing Act: Generally

The requirements contained in original Sections 13 and 14 of the Act of February 25, 1920 (41 Stat. 437, 441 and 442), do not apply to non-competitive oil and gas leases to be issued under Section 17 of the Act of February 25, 1920 (41 Stat. 437, 443), as amended by the Act of August 21, 1935 (49 Stat. 674, 676 and 677), and as further amended by Section 3 of the Act of August 8, 1946 (60 Stat. 950, 951; 30 USCA section 226). Section 17 has never contained authority for conforming unsurveyed leased lands to public survey.

Descriptions - Alteration.

A lease describing unsurveyed lands by metes and bounds is not subject to adjustment (enlarged, diminished, floated or shifted) to the nearest subdivisional lines when the lands are surveyed and the lease

describing the lands by metes and bounds is fixed to the location and area of land within the lease as described by metes and bounds.

It would be improper to incorporate into a non-competitive oil and gas lease describing lands by metes and bounds a provision to the effect that the lease will be conformed to the nearest legal subdivisions upon public survey of the land and that the lease will be cancelled as to the lands in conflict with prior leases.

Descriptions - Offers to Lease

An applicant applying for non-competitive oil and gas leases on lands subject to leasing under the Mineral Leasing Act of February 25, 1920, as amended, need only describe the lands within the United States in accordance with the regulations contained in 43 CFR 192.42(d), Circular 2002.

Surveys - descriptions - Lands available for leasing

If an oil and gas lease describing lands by metes and bounds description does not embrace all the lands in a subdivision that is established by a subsequent official survey, the unleased lands within that subdivision may be considered available for leasing provided that the Department determines that the leasing of the unleased lands will be in the public interest.

EDITOR'S NOTE:

This memorandum, unreported by the Department of the Interior at the time it was written, is distributed herewith for the information of all subscribers.

(4)(a), Departmental Manual; 24 F.R. 1348), the decisions by the Director and the Acting Director of the Bureau of Land Management are affirmed and the cases are remanded to the Bureau for further action in accordance with this decision.

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The Solicitor

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App. 24

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Denver Regional Office
Room 21, Building 54
Denver Federal Center
Denver, Colorado

M-36542

August 8, 1958

Memorandum

To: Area Administrator, Area 3, Bureau of
Land Management, Denver, Colorado
From: Regional Solicitor
Subject: (as above)

By memorandum dated April 17, 1958, the Area Administrator's Office requested our opinion on three controversial questions relating to non-competitive oil and gas leases on unsurveyed lands within the United States. Each question will be set out in full and our answer thereto will follow.

Question No. 1

Do the requirements contained in original Sections 13 and 14 of the Act of February 25, 1920 (41 Stat. 437, 441 and 442), apply to non-competitive oil and gas leases to be issued under Section 17, of the Act of February 25, 1920 (41 Stat. 437, 443), as amended by the Act of August 21, 1935 (49 Stat. 674, 676 and 677), and as further amended by Section 3 of the Act of August 8, 1946 (60 Stat. 950, 951; 30 USCA section 226)?

Answer

The original Section 13 of the Mineral Leasing Act of February 25, 1920, contains requirements relating to posting, monumentation, and description of the lands applied for in an oil and gas prospecting permit. Under original Section 14 of the act a permittee upon discovery of oil and gas was entitled to a lease covering a portion

of the land within the permit provided that if the lands were unsurveyed, the United States at the expense of the permittee applying for a lease would survey the lands, which lands to be described in the lease would be conformed to the legal subdivisions of such survey prior to the issuance of the lease. The Act of August 21, 1935, insofar as it related to prospecting permits, retained the above-said requirements contained in original Sections 13 and 14 of the Mineral Leasing Act of February 25, 1920.

Section 17 of the act, as amended by the Act of August 21, 1935 (49 Stat. 674, 676), and by Section 3 of the Act of August 8, 1946 (60 Stat. 950, 951; 30 USCA section 226), provides, in part, that when the lands to be leased are not within a known geologic structure of a producing oil and gas field, the person first making application for the lease who is qualified to hold the lease shall be entitled to leasing of such lands without competitive bidding. While Section 14 of the act provided for conforming the unsurveyed area in a prospecting permit to the public survey before lease would issue, Section 14 never applied to leases issued under Section 17. Therefore, after August 21, 1935, Section 14, of the act only applied to prospecting permits issued before that date or on applications filed at least 90 days prior to that date. Beginning 90 days prior to August 21, 1935, only non-competitive lease applications could be filed under Section 17 and the function of Section 14 was relegated to controlling rights acquired prior thereto and preserved by the 1935 act. Section 17 has never contained authority for conforming unsurveyed leased lands to the public survey.

Inasmuch as the provisions of the law governing non-competitive leases do not contain any language relating to posting, monumentation, and survey of lands to be leased non-competitively, an applicant for a non-competitive lease need only describe the public lands within

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Denver Regional Office
Room 21, Building 54
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Denver, Colorado

M-36542

August 8, 1958

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Inasmuch as the provisions of the law governing non-competitive leases do not contain any language relating to posting, monumentation, and survey of lands to be leased non-competitively, an applicant for a non-competitive lease need only describe the public lands within

the United States in accordance with the regulations contained in 43 CFR 192.42(d), Circular 2002.

Question No. 2

Is an accepted lease in an unsurveyed area, which is supported by a proper metes and bounds description, subject to adjustment to the nearest subdivisional lines when surveyed or will the location hold precisely to the lands embraced within such metes and bounds description, if so demanded by the lessee?

Answer

43 CFR 192.42(d) provides in part, that ". . . Each offer must describe the lands by legal subdivision, section, township, and range, if the lands are surveyed, and if not surveyed, by a metes and bounds description connected with a corner of the public land surveys by course and distance and must cover only lands entirely within a six-mile square . . ."

Usually an oil and gas applicant for unsurveyed lands in the customary metes and bounds description refers to a corner established by the then official government survey as a point of commencement and to this point of commencement the point of beginning for the tract is tied, and the tract is then described by courses and distances. Applicants sometimes state following the metes and bounds description that the tract described by metes and bounds when surveyed will be a certain section or subdivision thereof.

The regulations do not define what is meant by metes and bounds. Regardless of the form of metes and bounds description, the description must identify the lands with reasonable accuracy so that the tract of land described can be identified on the ground and acreage therein contained accurately determined. ^{1/}

^{1/} See the following decisions of the Director, Bureau of Land Management. Morgan Applications, etc., BLM-A-036376, etc. (June 7, 1956); Henry S. Mor-

Area representatives point out that the Director, Bureau of Land Management, in his monthly report of March 1958 to Washington Staff Officers, Area Administrators, and State Supervisors refers to his two recent decisions entitled Richfield Oil Corporation, Anchorage 028383, etc. (March 11, 1958), and Harry W. Stuchell, et al., Anchorage 024950, etc. (March 26, 1958). The Director in these two decisions appears to take the position that leases on unsurveyed lands may be adjusted or shifted to conform to the lines of the future official survey. In both of these decisions as authority for the proposition of adjustment of leases the Director cites Margaret Russell Justheim, et al., (ON PETITION), 52 I.D. 417 (1928).

The Department in Justheim, to the extent that it touched upon the adjustment of future leases to the public survey, was speaking to the law of that case. That law was Section 14 of the act, and the decision there necessarily followed the plain provision contained in that section. Justheim had no application to Section 17 leases and is now only of historical significance since there are no longer any oil and gas prospecting permits. The Department in Justheim did not hold that the description of a lease can be changed after its issuance. Accordingly, Justheim should not be cited as authority to support the proposition that leases issued noncompetitively on unsurveyed lands under the present statutory authorities can be adjusted or shifted to the lines of a subdivision of a survey or to the lines of a subdivision of a future official survey.

We are aware of D. Miller, Utah 0208 (April 22, 1958), where on appeal to the Director, the Director affirmed

gan, BLM 040336 (October 3, 1956); The California Company, BLM 040042 (Ia.) (January 30, 1957); Henry S. Morgan, Floyd A. Wallis, BLM-A 036376, etc. (June 5, 1957); Neil F. Stull, BLM-A 032785 (N.D.) (February 13, 1958); George Gilbertson, et al., Anchorage 025065, etc. (March 14, 1958)

the Salt Lake City Manager's decision "modifying" certain metes and bounds descriptions of oil and gas leases so that the leases could be more conformable to the proper aliquot subdivisions under the proposed plan of cadastral surveys. While this decision does not set out the facts fully, it appears that the original legal description describing the lands by metes and bounds upon which leases were issued originally were adjusted to conform to certain probable subdivisions portrayed on a protraction map of a proposed plan of cadastral surveys. The Director's decision appears to be inconsistent in that in the second paragraph of the decision the Director finds that there was no substitution of acreage in that the same 986 acres embraced in the original lease were included in the modified lease. However, the Director in the very same paragraph admits that even though very slight adjustments of exterior boundaries may have been made, the adjustments are so inconsequential and minute so as to be nonmeasureable, and thereafter apparently comes to a questionable conclusion that the slight adjustments of the exterior boundaries in no way substituted lands contained in the leasehold nor do they affect the rights of the lessee. If the same 986 acres embraced in the original lease were included in the modified lease, there would be no slight adjustment of the exterior boundaries. If there were slight adjustments of exterior boundaries of the tracts of land described, obviously the same land embraced in the original lease would not be included in the modified lease.

When an official survey is made, the surveyors will establish the corners and lines of the sections and this data will be shown on an approved plat. There is no assurance that the lands shown within certain legal subdivisions on a map of a proposed plan of cadastral surveys will correspond exactly to the official survey when made and no doubt certain inconsistencies between the plan of proposed survey and the official survey will become apparent.

Notwithstanding the above three recent Director's decisions regarding the question of adjusting leases to an official survey, or in absence of an official survey, to adjust the leases to subdivisions shown on a map under a proposed plan of cadastral surveys, we are of the opinion that neither the Secretary of the Interior nor his subordinates have been given authority by Congress under effective provisions of the Mineral Leasing Act to adjust or shift non-competitive oil and gas leases on unsurveyed public lands describing the lands by metes and bounds in accordance with 43 CFR 192.42(d).

Regardless of the desire of the parties to the lease to enter into agreements to conform by shifting the area described by metes and bounds to a legal subdivision of a subsequent official survey, we are of the opinion that the tract of land described in a lease on unsurveyed land by metes and bounds is fixed to the location and area of the land within the lease as described by metes and bounds, which leased tract cannot be enlarged, diminished, floated or shifted.

Question No. 3

Would it be contrary to the act to incorporate in a non-competitive oil and gas lease offer in an unsurveyed area the notation "This lease will be conformed to the nearest legal subdivisions upon survey and will be cancelled as to lands in conflict with prior leases"?

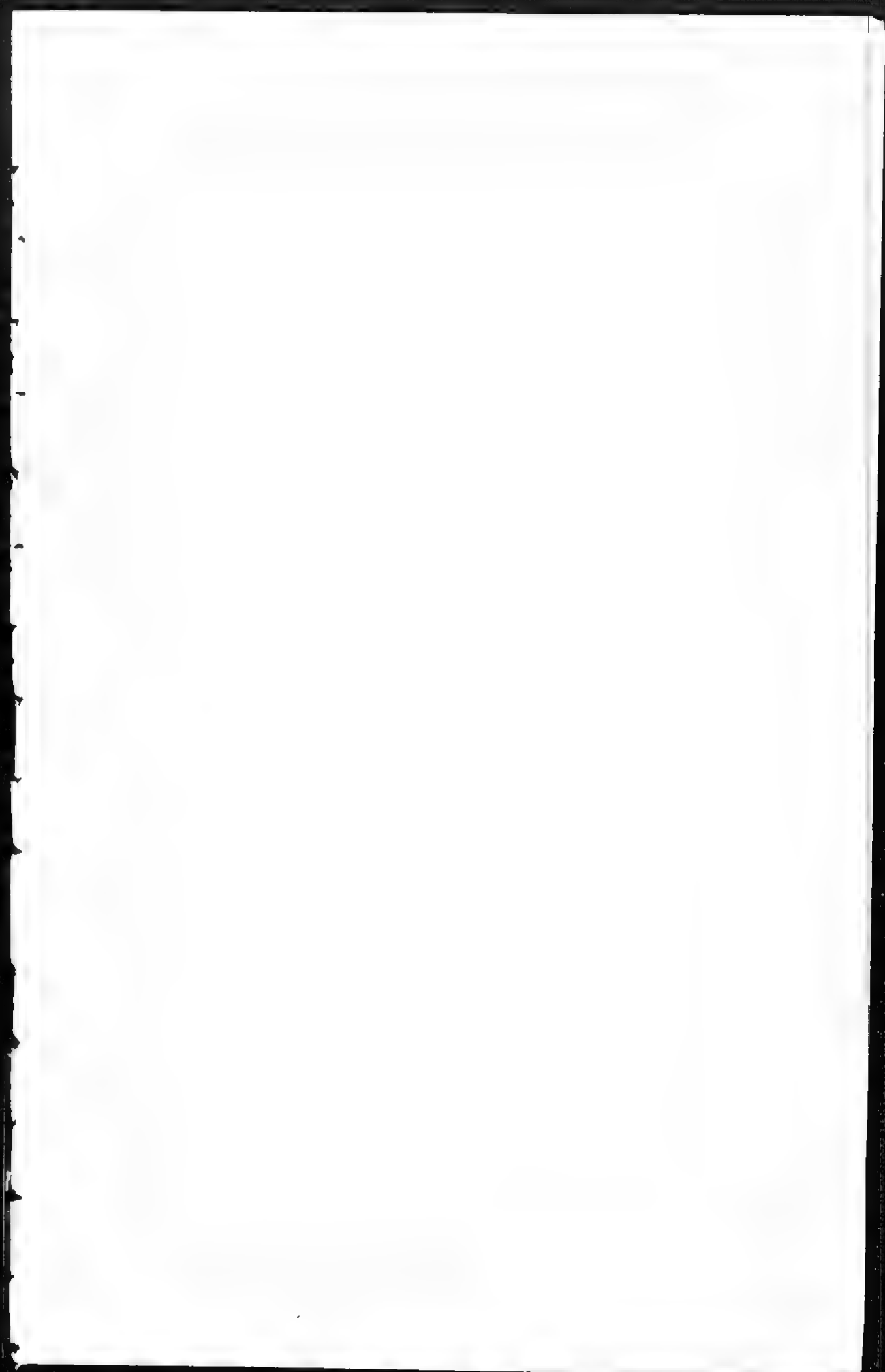
Answer

Since a lease describing a tract of land by metes and bounds only covers the lands embraced within the metes and bounds description, and since the lease is not subject to an adjustment (enlarged, diminished, floated or shifted) pursuant to any provisions of the law effective today, we are of the opinion that language in the lease form if incorporated regarding adjustment would be objectionable from a legal standpoint.

Since as a matter of law a subsequent lease is void as to those lands included in a prior outstanding oil and gas lease, we see no need to incorporate into the lease language dealing with the cancellation of the lease as to lands in conflict with prior leases.

If an oil and gas lease describing lands by metes and bounds description does not embrace all the lands in a subdivision that is established by a subsequent official survey, the unleased lands within that subdivision may be considered available for leasing provided that the Department determines that the leasing of the unleased lands will be in the public interest.

/s/ B. L. Kepford
For the Regional Solicitor
Denver Region



REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,362

CONTINENTAL OIL COMPANY,
Appellant,

v.

STEWART L. UDALL,
Secretary of the Interior,
and
PHILLIPS PETROLEUM COMPANY
and
AZTEC OIL & GAS COMPANY,
Appellees.

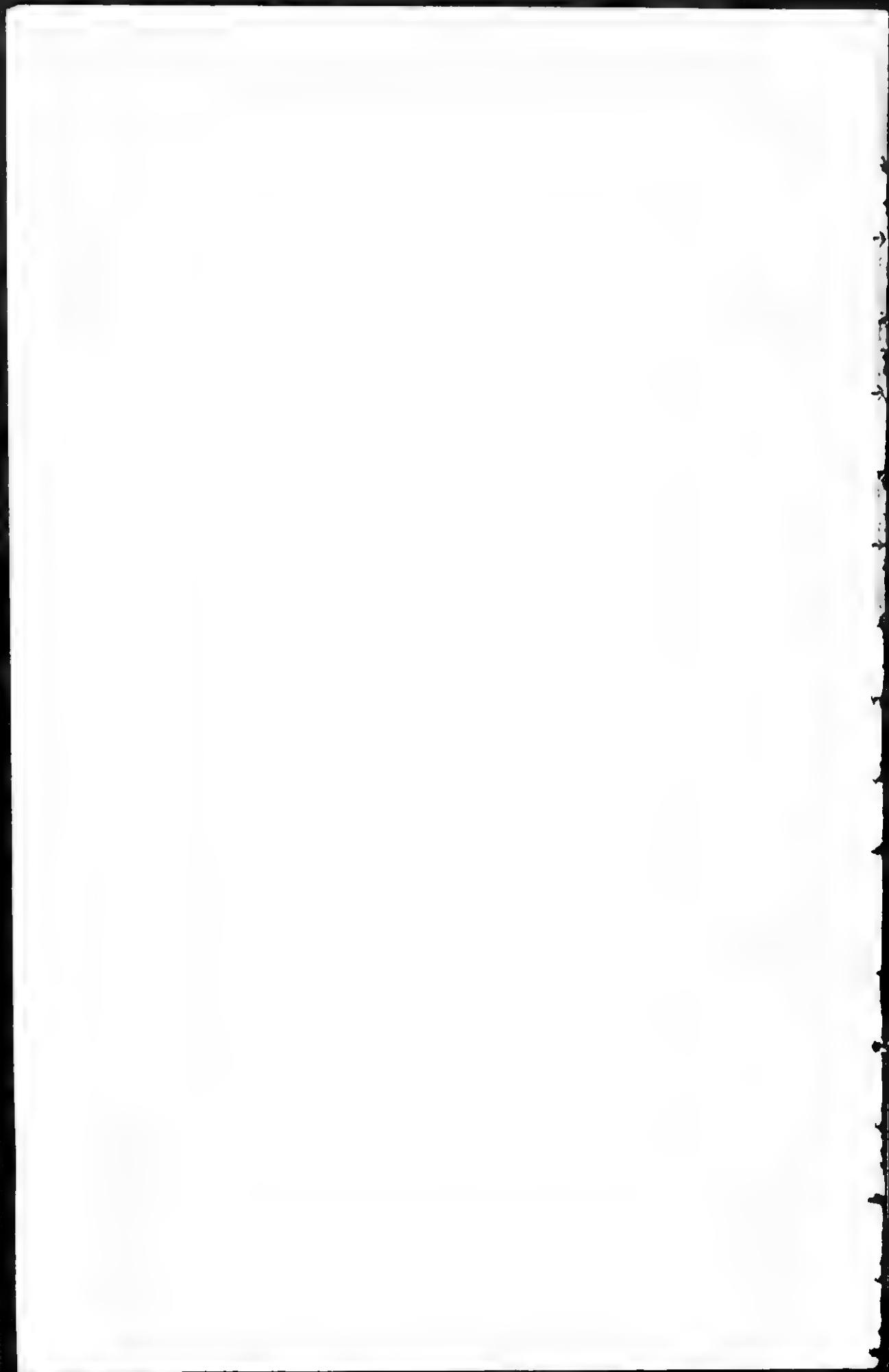
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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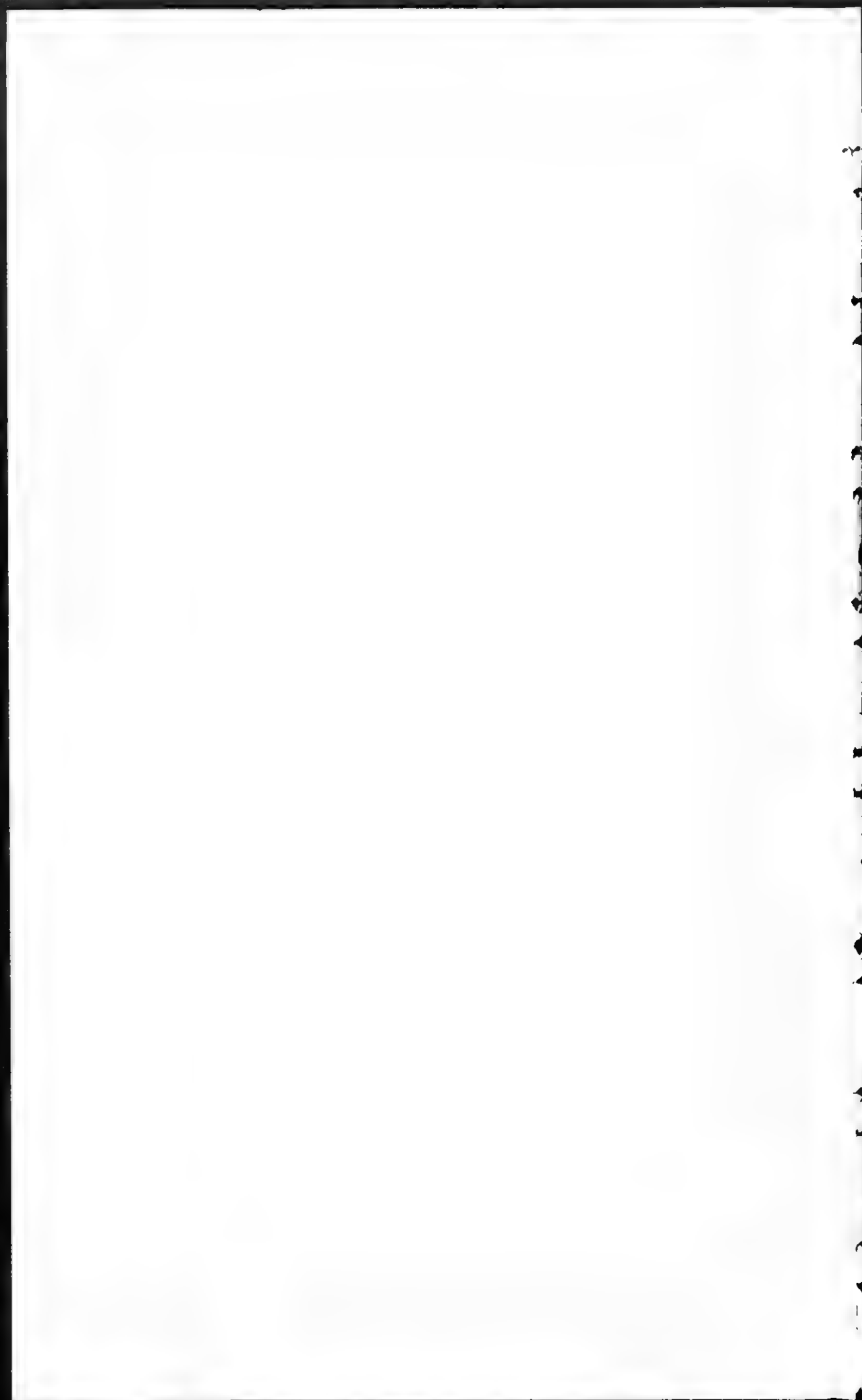
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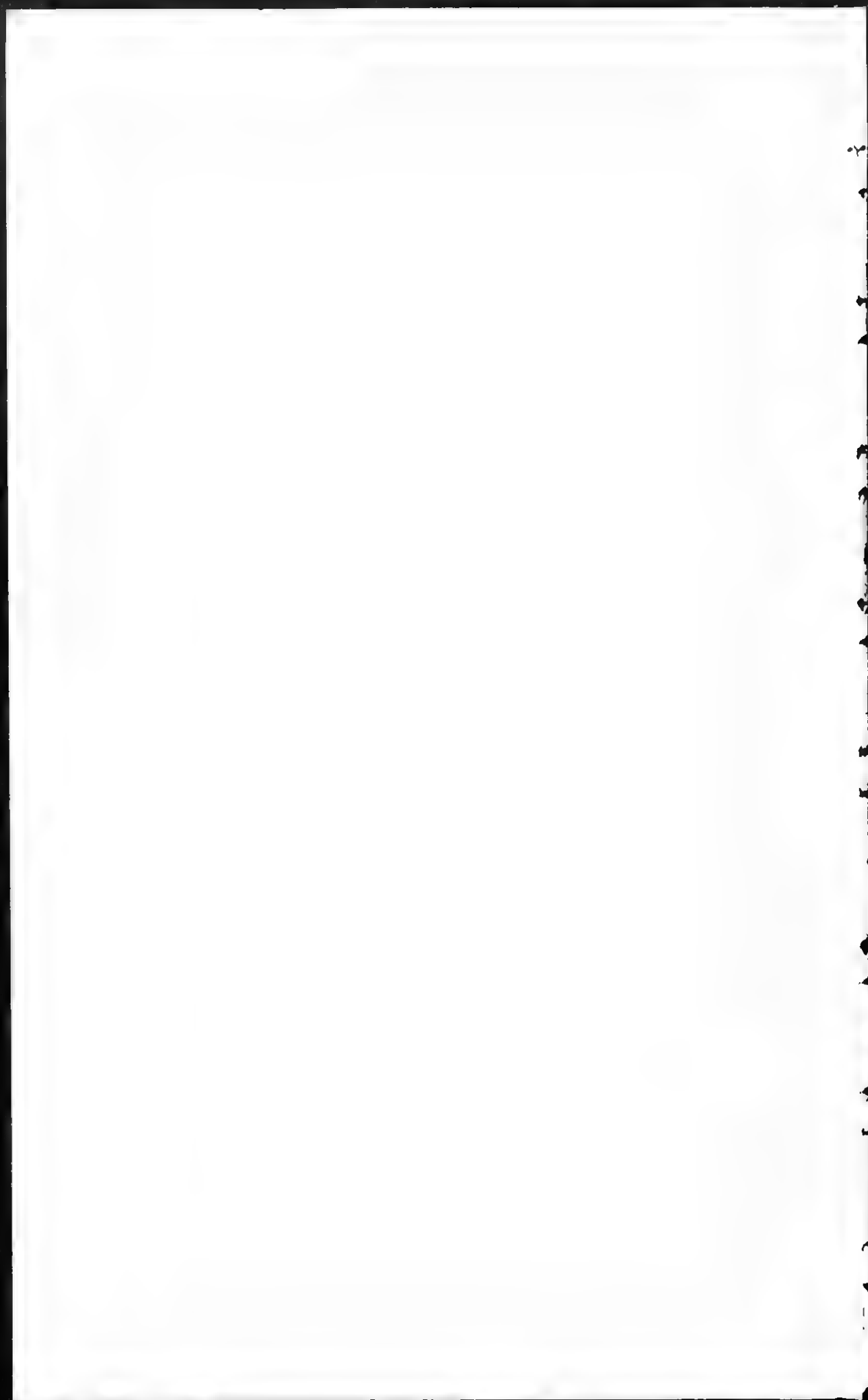
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I

THE CONSTRUCTION OF THE LEASES

Whatever the situation may be as to this action being one in the nature of mandamus, as contended by the defendant Secretary, the Administrative Procedure Act provides for a review of decisions of the Secretary of the



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I

THE CONSTRUCTION OF THE LEASES

Whatever the situation may be as to this action being one in the nature of mandamus, as contended by the defendant Secretary, the Administrative Procedure Act provides for a review of decisions of the Secretary of the

Interior where such decisions are not in accordance with law. 5 U.S.C.A. § 1009(e) provides in part:

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of any agency action. It shall * * * hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *."

The decision of the Secretary in this case was not in accordance with law because he construed Continental's leases in violation of established legal principles. This error of the Secretary was one involving his judicial function, not his administrative function.¹ The question here, therefore, is not whether the Secretary, in his administrative capacity, was "plainly wrong" but whether he exercised his judicial function in accordance with legal requirements. This he did not do.

The intervenors' and defendant Secretary's argument amounts to this. In construing the plain language of the leases, the Secretary may treat the matter as one of administrative discretion and completely disregard legal standards. This approach confuses the administrative function of the Secretary which applies to the determination of the form of lease to be issued and the judicial function which applies to the construction of the language of the lease, once it has been issued.

¹ The line of demarcation between the judicial function and the administrative function of an administrative agency is clearly recognized. See Davis, *Administrative Law* (1951), chapters 6 and 7, pages 229 through 273. The administrative function, sometimes called the rule making or policy making function, is that involving the making of regulations, and in this area the administrative official has broad discretionary powers. The judicial function is that of deciding legal issues that come before the administrator in individual cases. These legal issues must be decided by him in accordance with law.

The administrative function of the Secretary ended when he determined the form of lease to be sold. Having settled upon a metes and bounds lease and the lease having been sold and entered upon in this form, the Secretary is bound, as a matter of law, to construe the lease in accordance with judicial requirements.

Intervenors' notion that the Secretary's judicial function can be changed to an administrative function by reason of the existence of a regulation stating that the area of an Indian lease "'* * * shall conform to the system of public land surveys * * *'" adds to the confusion. 25 C.F.R. § 171.8. The regulation provides merely a guide for describing the area to be leased pursuant to the statute authorizing the leasing of such lands in general terms. 52 Stat. 347, 25 U.S.C. § 396a.

Intervenors assert, in effect, that under this regulation, (1) Indian lands must be leased by sections, and (2) no matter how the area leased is described, the Secretary should, in his administrative capacity, construe the lease to cover sections.

First, the regulation is not clear as to how it applies to unsurveyed lands, or, even if it applies. A metes and bounds lease tied to a monument of the public land system of surveys, as Continental's are, may very well be said to be in conformity with the system.

Second, nowhere in his decision does the Secretary say that the regulation prohibits leasing by metes and bounds tied to a monument of the system of public land surveys. The only reference to 25 C.F.R. § 171.8 in his entire decision is where he alludes to an observation of the Commissioner of Indian Affairs as to the intent of the leasing operation.

Third, regardless of how the Secretary may now say that he interprets this regulation, there is no getting away from the fact that in the very leases here under consideration, the area leased is described by metes and bounds

tied to a monument of the system of public land surveys; and, the leases with the area so described were approved by the Secretary. Prior to the approval of these leases, the Secretary had approved numerous leases of Tribal lands where the area was described in such manner. Conduct by the Secretary consistently construing a regulation or order as not prohibiting leasing in a particular manner is conclusive that such order or regulation is not prohibitory. *Tallman v. Udall*, 380 U.S. 1 (1965). There the Secretary had issued numerous leases on lands covered by a withdrawal order which said:

"None of the above described lands * * * shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska
* * *."

The court held that by the very act of issuing the leases, the Secretary construed the order as not applying to oil and gas leasing. On this point, the court said at page 4:

"* * * Since their promulgation, the Secretary has consistently construed both orders not to bar oil and gas leases; moreover, this interpretation has been made a repeated matter of public record.
* * *"

That is precisely the situation here.

Fourth, even if the Secretary by his conduct is not deemed to have interpreted the regulation as permitting leasing by metes and bounds, the fact remains that he did officially approve Continental's metes and bounds leases. They are valid and subsisting metes and bounds leases. A lease irregularly issued is not subject to cancellation in the absence of intervening rights.²

² Intervenors, in their brief, have cited a number of cases where a lease issued in violation of a regulation has been cancelled. But, in all of these cases another applicant had properly filed for a lease covering part or all of the same lands. The rule is otherwise where there are no intervening rights. *Stephen*

There are no intervening rights involved in the case here because both intervenors' and Continental's leases were bid in at the same time and at the same sale, and the area covered in each lease is described by metes and bounds.

It is not within the administrative authority of the Secretary to describe the area leased in one way and then construe his own language as describing another and different area.

II

IMMATERIAL MATTERS

The other points made by the defendant Secretary and intervenors in their briefs and not touched on in our earlier brief relate largely to immaterial matters. It is immaterial to a decision in this litigation that there were 214 tracts advertised for sale. It is immaterial that a land area of 528,000 acres was being offered for leasing. It is immaterial that there might be one set of monuments showing the section boundaries and another set of monuments showing oil and gas lease boundaries in the area. It is immaterial that other leases in the area might overlap. It is immaterial that titles to other leases in the area may be in jeopardy.

By way of comment, however, it might be observed that in making these statements in their briefs, both defendant Secretary and the intervenors overstate their case. A simple reading of the metes and bounds descrip-

P. Dillon, Martha M. Broderick, 66 I.D. 148 (1959); *Columbia Carbon Company, Merwin E. Liss*, 63 I.D. 166 (1956), affirmed in *Liss v. Seaton*, No. 3233-56 (D.D.C. 1958); *D. Miller*, 63 I.D. 257 (1956); *Earl W. Hamilton*, 61 I.D. 129 (1953). For example, in the *Hamilton* case, the lease was issued in violation of a regulation requiring that the lease cover lands within a six-mile square. But, there being no intervening rights, the Solicitor in a well reasoned opinion ruled that the lease was not subject to cancellation.

tion of Continental's leases and intervenors' leases shows that the north boundary of the Continental leases and the south boundary of intervenors' leases, as described by metes and bounds, coincide exactly. Moreover, there is absolutely nothing in the entire record before this Court showing that the title to any other lease in the area would be thrown into jeopardy as a result of the lease boundaries being held to follow the metes and bounds description, or that if such a conflict exists, the conflict has not been resolved by the parties affected. In short, the record simply fails to show that there would either be confusion or a serious overlapping of lease boundaries if the metes and bounds descriptions are followed.

III

ERRORS AND ALLEGED INACCURACIES

Intervenors' counterstatement of case includes certain assertions concerning the facts and circumstances surrounding the making of the official Bureau of Land Management survey. These assertions go beyond the simple fact that Continental was one of the oil companies that paid for the survey and they go beyond anything that appears in the Secretary's decision either as a finding of fact or a fact upon which the Secretary relied. The basis for the assertions of intervenors can be found only in interoffice communications in the files of the Secretary, to which Continental has objected as not properly being a part of the record in this case. Continental takes exception to these assertions.

Intervenors also raise various questions as to the way in which Continental surveyed out the boundaries of its leases by metes and bounds. The Secretary in his decision found no occasion to challenge Continental's metes and bounds survey and indeed expressly recognized that under the metes and bounds description, Continental's

leases included approximately 300 acres more than the
"when surveyed probably will be" sections.

Respectfully submitted,
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BRIEF FOR APPELLEES PHILLIPS PETROLEUM
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Appeal from the United States District Court
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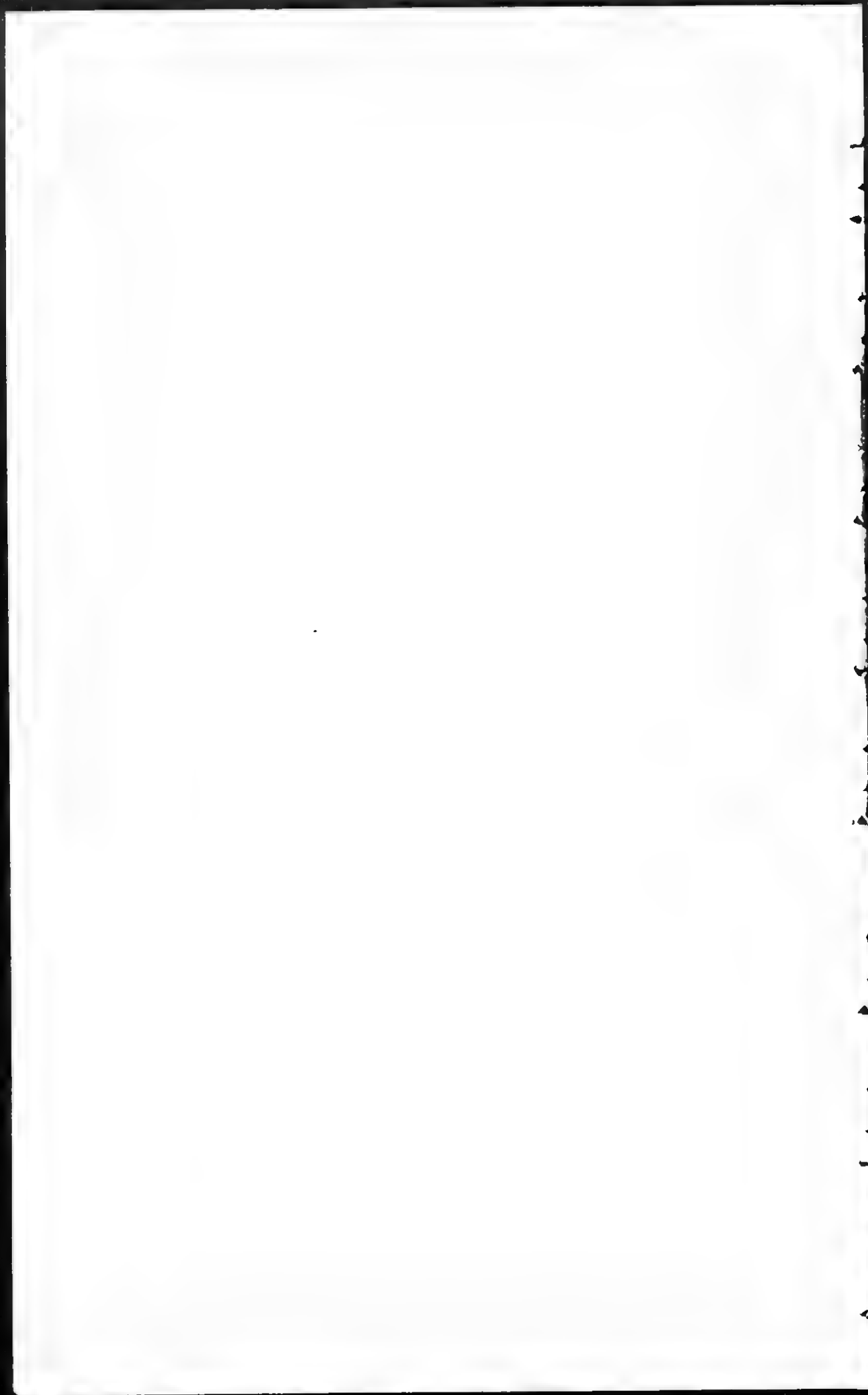


STATEMENT OF QUESTIONS PRESENTED

The appellees' view of the questions presented on this appeal are different from the appellant's view, and the primary question is stated as follows:

QUESTION: Where a regulation of the Secretary of Interior provides that the area of certain Indian lands to be leased for oil and gas purposes "shall conform to the system of public-land surveys" and the lease issued under authority of the Secretary describes the area first by metes and bounds and then by sections with only the section description conforming to the system of public-land surveys, did the Secretary act unreasonably in applying his regulation and holding that the section description, which conformed to the system of public-land surveys, controls over the metes and bounds description, which did not conform to the system of public-land surveys?

The questions presented by appellant, if at all germane, are subordinate questions to the primary question as above presented.



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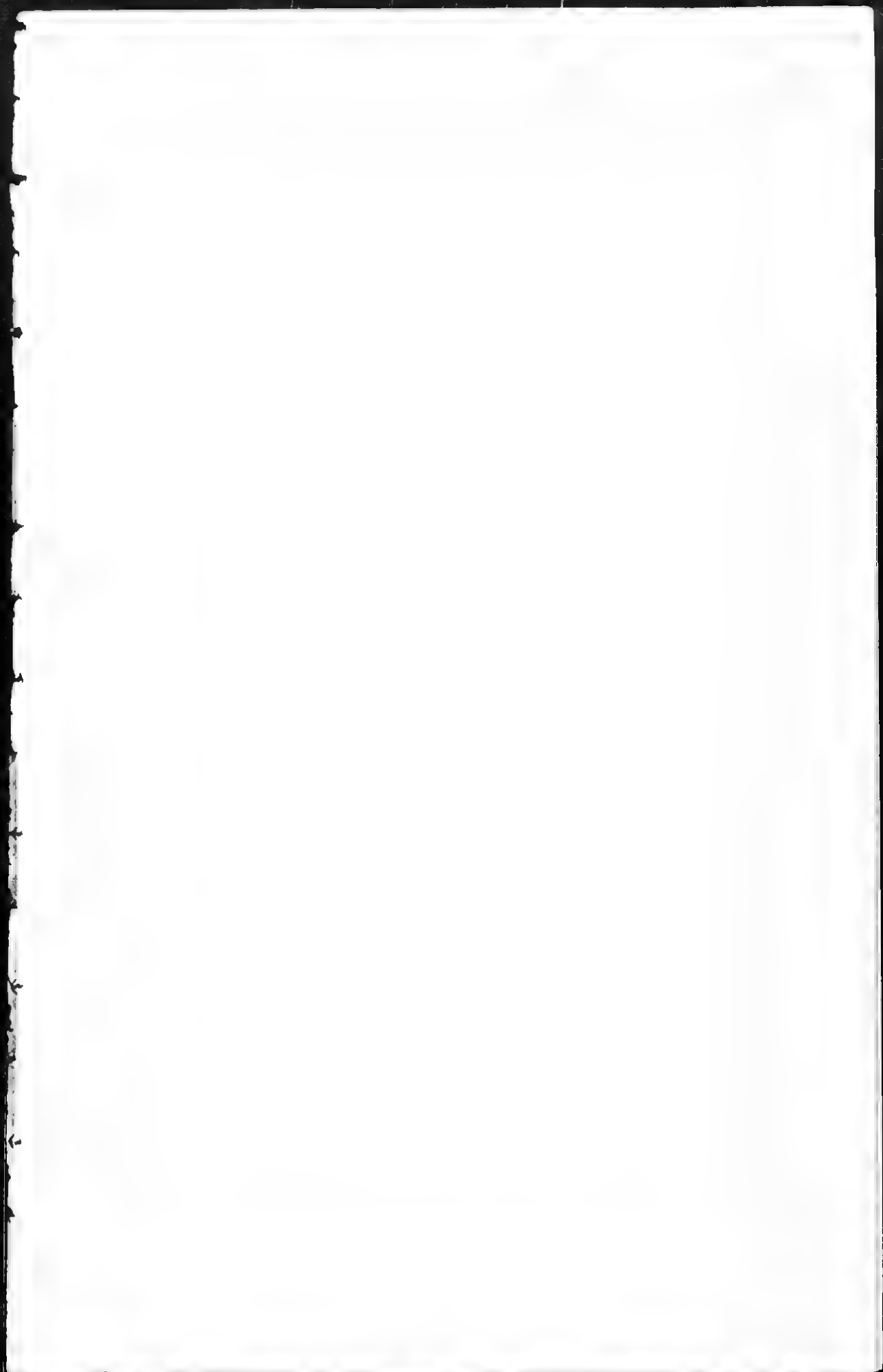
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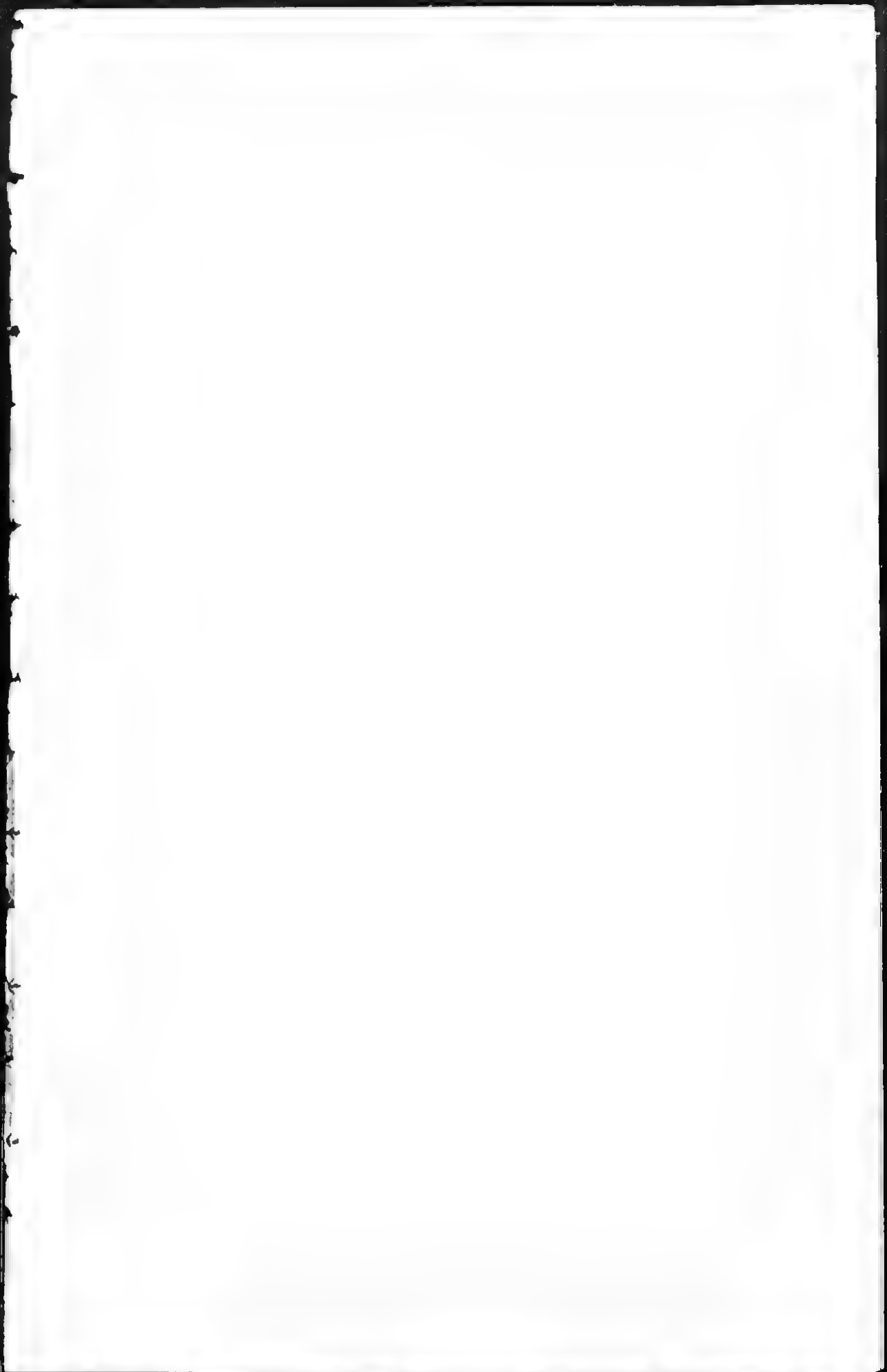
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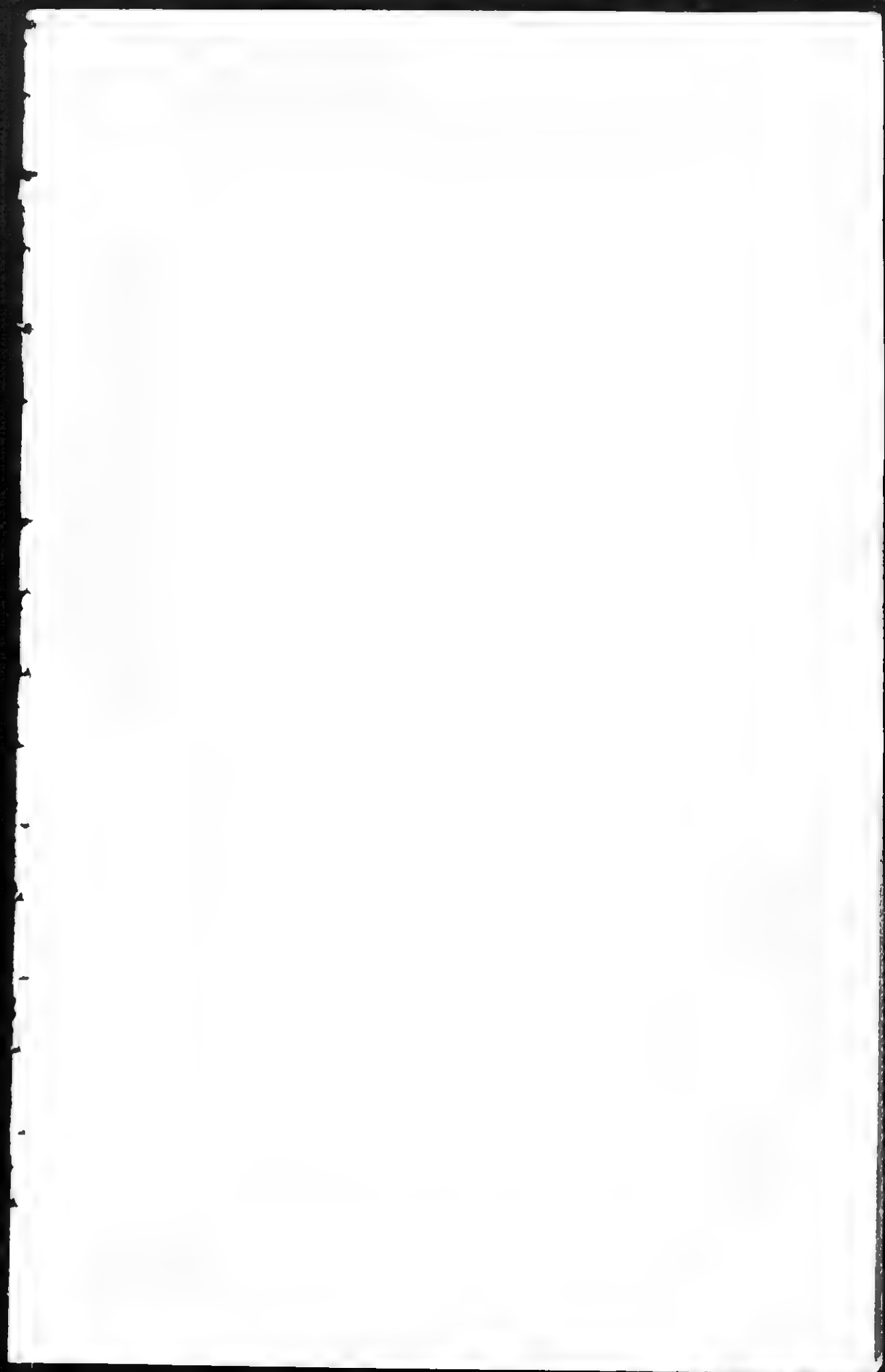
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STEWART L. UDALL, Secretary of the Interior,
PHILLIPS PETROLEUM COMPANY, and
AZTEC OIL & GAS CO., *Appellees*.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES PHILLIPS PETROLEUM
COMPANY AND AZTEC OIL & GAS CO.

COUNTERSTATEMENT OF CASE

This was an action by appellant, Continental Oil Company, to review, on the basis of the administrative record, a decision by the Secretary of the Interior. That decision affirmed an administrative refusal of permission to appellant to drill for oil on a certain tract of land. The ground for the refusal was that the land was not covered by two Navajo Tribal leases acquired by appellant in 1953 at a lease sale administered by the Department of the Interior because, contrary to appellant's claim, those leases properly construed con-

veyed the lands described therein by sections, in accordance with the system of public-land surveys, and not according to a conflicting metes and bounds description, also found in the leases.

Phillips Petroleum Company and Aztec Oil and Gas Co., appellees herein (hereinafter referred to as "intervenor-appellees" or "intervenor"), are the joint owners of two Tribal leases which lie directly to the north of the Tribal leases held by appellant and which would be encroached upon if appellant's claim, that its leases cover lands described by metes and bounds descriptions, were to prevail.

Bureau of Indian Affairs File No. 10727—1958—Navajo 322, consisting of Parts 1 and 2, containing documents relating to IA-1014, has been certified to the Court as constituting the administrative record in this proceeding. On December 20, 1965, the Court overruled objections by appellant to various items in such record and at the request of the appellant and over the objections of the appellee and intervenor-appellees received into evidence as part of the record nine Tribal leases from the files of the Secretary which had not been included in the record as so certified.

The following facts are substantiated by the administrative record, and are here presented in expository form:

1. Under Advertisement 41 dated March 24, 1953, the United States Department of Interior announced that sealed bids would be received for oil and gas leases on Navajo Tribal Lands on the tracts described therein, and that the tracts described averaged about 2,560 acres each and involved a total of 214 tracts aggregating approximately 528,000 acres. The lands were divided into Blocks A, B, C and D, and reference was

made to the legal descriptions in the advertisement and the map attached as showing designation of tract numbers. (JA 16-17). The advertisement stated that each lease would be issued in accordance with the Act of May 11, 1938, 52 Stat. 347, as amended, 25 U.S.C. §§ 396a-396g (1964), and the regulations approved May 31, 1938, as amended, 25 C.F.R. part 171 (1966). (JA 17).

2. Section 2 of the Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. § 396b, provides in part as follows:

“Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe.”

And Section 4 of the Act, 52 Stat. 348, 25 U.S.C. § 396d, provides in part as follows:

“All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior.”

3. Regulations approved May 31, 1938, and still in force today, provide in part as follows:

“Lands to be in compact body. The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys” (25 C.F.R. § 171.8 (1966))

4. The advertisement contained the following language:

“The following conditions will be incorporated in the leases:

“1. This land is offered on a tract basis and the bids shall not be on an acreage basis. The

acreage herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. No refund or additional payment of rental shall be required to be made because of a difference in the acreage stated and that shown by the survey. Neither shall such a difference in acreage be grounds for any adjustment of the bonus.

"2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U. S. Geological Survey, P.O. Box 997, Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat." (JA 18-19).

5. Among the tracts referred to in the advertisement were Tracts 87, 88, 96 and 97. The reference to Tract 88, which was typical of the references to the other three tracts, was as follows:

"Point of origin to which most of the unsurveyed portion of the following tracts are referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner (JA 155).

"Tract No. 88

"Beginning at a point 73,293 feet west along the boundary between the States of Utah and Arizona and 63,360 feet north of the point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence east 10,560 feet to the point of beginning; the north, west, south and east boundaries of said tract being common to the south, east, north and west boundaries of Tracts 87, 79, 89 and 97 respectively. Tract No. 88 when surveyed probably will be described as follows:

"Sections 29, 30, 31 and 32 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres." (JA 25).

6. Bids on tracts within Block B were received and opened on May 1, 1953. Appellant was the successful bidder on Tracts 88 and 97 and the predecessor of intervenors-appellees Phillips Petroleum Company and Aztec Oil & Gas Co. was the successful bidder on Tracts 87 and 96.

7. Prior to the issuance of the leases here involved, and well prior to their approval by the Secretary, a group of oil companies, of which appellant was one, requested that a public land survey of the unsurveyed lands covered in the advertisement be made by the Bureau of Land Management. This request was made because of a recognized variance in the description of some tracts which referred to public-land survey sections as well as to metes and bounds. This variance occurred because in the preparation of the metes and bounds descriptions contained in the advertisement it was not recognized that the surveyed east boundary of T. 43 S., R. 26 E., was 7.40 chains, or 488.4 feet, short of being the normal six miles, said boundary instead erroneously being assumed to be the normal six miles

in length. At a meeting of oil company representatives on June 25, 1953, at which appellant was represented by William H. Carpenter, Division Land Superintendent, who was also elected to the oil company committee (Navajo Indian Survey Committee), the problems involved were discussed with the Bureau of Land Management (BLM), and the Navajo Indian Survey Committee was given the opportunity to review the proposed survey of the area by the BLM as well as the surveying instructions. The conditions given under the surveying instructions were accepted by the oil companies (including appellant) with the payment of their proportionate share of the cost of the survey. In the meeting on June 25, 1953 between the oil company representatives and the BLM, in a letter dated July 6, 1953, from the Regional Chief, Division of Cadastral Engineering, to the Chairman of the Navajo Indian Survey Committee and in the surveying instructions, dated July 28, 1953, it was recognized that some of the tracts partially described by metes and bounds in the advertisement could not be given their full calls because of the original error in failing to recognize that the distance between the Four Corners monument and the Page & Lentz survey north of the San Juan River was short of the total distances used in writing the metes and bounds calls, and also because of a failure to allow for convergency in writing the metes and bounds calls. By statements made in the surveying instructions dated July 28, 1953, which were reviewed and approved by Continental Oil Company, it was clearly shown that the lower tier of sections included in Tracts 88 and 97, for which Continental Oil Company had been the successful bidder, would be fractional sections and would not comply with the metes and bounds descriptions for said tracts. (JA 103 *et seq.*).

The survey of the area covered by the advertisement was undertaken by the Bureau of Land Management between August 7, 1953 and November 3, 1953. (JA 163).

8. Oil and gas leases covering Tracts 88 and 97 were entered into between the Navajo Tribal Council and Continental on October 13, 1953, and between the Council and intervenors-appellees' predecessor in interest on October 27, 1953, covering Tracts 87 and 96. These leases were approved by the Department of Interior only after the completion of the BLM survey, on December 10, 1953 and January 8, 1954, respectively. A copy of the official survey of the township boundary of T. 41 S., R. 24 E., within which the above four tracts were described, was approved on May 10, 1954. (JA 163).

9. Under condition number 2 of the leases, prior to the commencement of the drilling of a well, a lessee was required to have his leased premises surveyed and boundaries posted with substantial monuments. Certified copies of such surveys were required to be filed with the Supervisor, U. S. Geological Survey, and the Area Director. It was further provided that the Supervisor would not grant permission to drill prior to receipt of such survey. (JA 19). Pursuant to this condition of the leases, in September, 1956, Phillips Petroleum Company filed with the Supervisor and Area Director a survey of Tracts 87 and 96 showing the location of Sections 15-22 as being covered by intervenors-appellees' leases, and showing that the boundaries of such leases had been posted with substantial monuments. (JA 75).

10. In the latter part of 1956, Continental negotiated a farmout with Davis Oil Company, under

the terms of which Davis Oil Company was to drill a test well in Section 27 (which was located in Tract 97) and Continental was to assign to Davis Oil Company four separate 80-acre tracts in said Section 27. (JA 7).

11. Also pursuant to the lease condition described in paragraph 9, *supra*, prior to the commencement of the drilling of a well on its lease, in December, 1956 and January, 1957, appellant caused to be filed with the Supervisor and Area Director surveys of Tracts 88 and 97. These surveys showed that Tracts 88 and 97 covered Sections 29, 30, 31 and 32 and Sections 27, 28, 33 and 34, respectively, all in conformity to the system of public-land surveys, with no mention being made of a survey of the metes and bounds description under the leases. The surveys stated on their face they were of Navajo Tribal Leases 14-20-603-407 and 14-20-603-409 and of Tracts 88 and 97, respectively. (JA 76, 77).

12. In December, 1956, the Supervisor granted permission to drill the Davis No. 1 Navajo Well in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27. The Supervisor also approved for drilling at the request of Continental and Davis the Davis No. 2 Navajo Well in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27 (in March, 1957), the Continental No. 1 Navajo "A" Well in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27 (in March, 1957), and the Continental No. 2 Navajo "A" Well in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27 (in May, 1957). In March of 1957 the Davis No. 1 Navajo Well resulted in discovery of oil, it being the discovery well in the White Mesa Field.

13. In June, 1957, the Supervisor approved for drilling the Phillips-Aztec Navajo "A" No. 1 Well located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22 at a point

510 feet north of the northern section line of Section 27. This well was completed as a producer on July 31, 1957. (JA 67).

14. On August 14, 1957, after it had become clear that it would be to appellant's great economic advantage to attempt to establish its lease boundaries in terms of the metes and bounds description rather than in accordance with the survey previously filed, appellant notified Phillips that it had recently completed "new surveys" of its leases and that it appeared that the Phillips-Aztec "A" No. 1 Well was located on a Continental lease. On or about the same date Continental filed with the Area Director and Supervisor plats claiming them to be the survey of the metes and bounds description of its two leases here involved. (JA 78).

15. On or about May 9, 1958, appellant requested the Supervisor's approval to drill Continental's Navajo B-9 Well to be located in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20. Permission to drill this well was denied by the Supervisor upon the ground that the location of such well would be upon lands not covered by Continental's lease but rather covered by Phillips-Aztec's lease. While this request was pending, Phillips Petroleum Company requested the Supervisor's approval to drill Phillips' No. 10-A Desert Well to be located in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20. Appellant protested this request and the Supervisor approved the Phillips well location. (JA 68).

16. From these two adverse rulings appellant appealed to the Commissioner of Indian Affairs, who sustained the Supervisor. (JA 90-95). Appellant

then appealed from the decision of the Commissioner to the Secretary of the Interior who, by decision dated November 8, 1961, affirmed the decision of the Commissioner. (JA 38-46). Appellant appealed the case to the United States District Court for the District of Columbia, which on April 29, 1966 dismissed the appellant's action. (JA 167).

STATUTES AND REGULATIONS INVOLVED

In addition to the Statutes and Regulations cited by appellant on pages 7-8 of its brief, the following portion of Section 4 of the Act of May 11, 1938, 52 Stat. 348, 25 U.S.C. § 396d, is cited:

"All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior."

SUMMARY OF ARGUMENT

I. This case essentially involves the interpretation by the Secretary of the Interior of a long-standing regulation by the Secretary affecting the leasing of unallotted Indian Lands. The regulation provides that the area covered by such a lease *shall* conform to the system of public-land surveys. When such a lease was issued to the appellant, the lease contained a description of the tract delineated by metes and bounds, as well as a description of the sections the tract would cover when surveyed. When it appeared that the metes and bounds description was in conflict with the section description, the Secretary was called upon by the appellant to determine whether the metes and bounds description in the lease controlled or whether the section description in the lease controlled. Since only

the section description allowed the area covered by the lease to conform to the system of public-land surveys, the Secretary applied his regulation and held that the section description controlled.

In view of this essential nature of the case, the scope of review by this Court is to determine whether the Secretary's interpretation was reasonable. It is intervenors' position that such interpretation was reasonable.

II. The Secretary's decision is not only reasonable but has a sound basis in law, when the lease is construed under recognized and applied rules of construction.

III. A review of the whole record shows that, rather than being prejudiced, the Interior officials made a concerted effort to investigate the equities of appellant's claim. With no substantial equities being disclosed, the regulation governing the area of a lease was applied.

IV. In an administrative hearing where no formal record has been made, it is not improper that the record to be reviewed have included within it all of the matters which the agency considered in making its determination.

ARGUMENT**I.****THE SECRETARY'S DECISION IS REASONABLE IN LIGHT
OF HIS LONG-STANDING REGULATION**

The leases, which are in issue in this case, cover two tracts of land out of a total of 214 tracts of land that were offered through the United States Department of Interior on Navajo Tribal Lands in the Arizona and Utah Four Corners Area (where the state boundaries of Arizona, Utah, Colorado, and New Mexico converge). The two tracts involved here were two tracts out of 186 tracts of unsurveyed lands at the time of the offer (17 tracts lying north of the San Juan River had been surveyed and 11 tracts lying both north and south of the river had been surveyed only as to those portions lying north of the river). Each unsurveyed tract was described by metes and bounds from the Four Corners monumented point. The metes and bounds descriptions were not surveyed descriptions but were estimates made from office observation and described tracts of 2560 acres each. Each unsurveyed tract was also described essentially as follows:

“Tract — when surveyed will probably be described as follows:

“Sections —, —, — and — of T — S, R — E, S.L.M., and containing a total of approximately 2560 acres.” (JA 25).

After the bids were received on all tracts and before the leases were issued it was determined that the metes and bounds descriptions were in error because it was not recognized at the time the metes and bounds descriptions were laid out in the office that the distance between the Four Corners monument and the surveyed

area north of the river was some 488.4 feet short of the distance used in estimating the metes and bounds descriptions. Nevertheless, the leases offered were leased containing both descriptions. Prior to the leases being approved by the Secretary, a survey of all unsurveyed areas was completed and all the unsurveyed land was identified, or capable of being identified, by sections.

Therefore, the metes and bounds descriptions for the two tracts in question (Tracts 88 and 97) were in conflict with the designated sections descriptions, and the four sections contained in each of the two tracts in question contained a total of approximately 2,411 acres and not approximately 2,560 acres.

The survey of the sections was an official Bureau of Land Management survey, and at no time was there any objection to the manner in which the survey was made and the sections located. The sections so located conformed to the system of public-land surveys and the metes and bounds descriptions were in conflict with the sections.

Because of such conflict, the appellant called upon the Secretary to make a determination of whether the area covered by its leases was controlled by the metes and bounds description or by the section description.

In such a situation, the Secretary looked to a regulation which had been in existence since 1938 which provided that the area covered by a lease of Indian lands, such as those involved, *shall* conform to the system of public-land surveys (25 C.F.R. §171.8). Applying such regulation, which had been made a part

of the lease, the Secretary ruled that the area covered by appellant's leases were described by sections, which conformed to the system of public-land surveys, and not by the conflicting metes and bounds description which did not and could not be conformed to the system of public-land surveys.

It is submitted that the Secretary's decision was reasonable and should therefore be sustained.

Under the Administrative Procedure Act the scope of review by this Court of the Secretary's decision in this matter is limited to a determination of whether the "actions, findings, and conclusions" are "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" (5 U.S.C.A. §1009(e)). In *McKenna v. Seaton*, 104 U.S. App. D.C. 50, 54, 259 F.2d 780, 784, *cert. denied*, 358 U.S. 835 (1958), the Court said:

"... there is a long line of decisions of the Supreme Court, of this court, and of other courts, that the primary responsibility for the solution of such questions as this, arising in the administration of the land laws, is with the Secretary of the Interior, whose decision will not be superseded by the courts except under limited conditions. These conditions are expressed variously in the opinions of the courts, and we need not adopt as applicable to the circumstances of the present case all prior expressions. But a fair common denominator, as it were, of the conditions which will cause judicial repudiation of administrative action by the Secretary, is at least that he is plainly wrong. *Lane v. Hoglund*, 244 U.S. 174, 37 S.Ct. 558, 61 L.Ed. 1066; *Chapman v. Santa Fe Pac. R. Co.*, 90 U.S. App. D.C. 34, 198 F.2d 498"

In the case of *Safarik v. Udall*, 113 U.S. App. D.C. 68, 74, 304 F.2d 944, 950 (1962), the Court said:

"It is obvious that the Secretary of the Interior, in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong."

For similar expressions see: *Udall v. Tallman*, 380 U.S. 1 (1965) (reasonable); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (not plainly erroneous); *Robertson v. Udall*, 121 U.S. App. D.C. 216, 349 F.2d 195 (1965) ("not plainly beyond the bounds of reason or authority"); *Southwestern Petroleum Corp. v. Udall*, 117 U.S. App. D.C. 60, 325 F.2d 633 (1963) (Secretary's decision held not to be "unreasonable"); *Boesche v. Udall*, 112 U.S. App. D.C. 344, 303 F.2d 204 (1961), *aff'd*, 373 U.S. 472 (1963) (reasonable); *Wright v. Paine*, 110 U.S. App. D.C. 100, 289 F.2d 766 (1961) (not plainly erroneous); *McGarry v. Udall*, 216 F.Supp. 314 (D.D.C. 1962), *aff'd*, 115 U.S. App. D.C. 184, 317 F.2d 595 (1963) (not clearly wrong).

On pages 18 and 19 of its brief, appellant cites several cases indicating that the courts have the same power as the Secretary to interpret the leases in question and that the interpretation is a matter of law which the courts can make without regard to the Secretary's decision thereon. All cases cited by appellant on this point do not in any way involve a review by the courts of an administrative decision, but involve only appeals from findings of fact or law by a court. The scope of review by an appellate court of a judge's finding is governed by rules different from those gov-

erning the scope of review by the court of an administrative decision. In the former case it is governed by cases cited by appellant; in the latter case, which is this case, the scope of review is governed and limited, as indicated in cases cited above, to a determination whether from a legal or factual standpoint the decision is unreasonable, plainly wrong, or beyond the bounds of reasons or authority.

Thus in *Chapman v. Santa Fe Pac. R. Co.*, 90 U.S. App. D.C. 34, 38, 198 F. 2d 498, 502 (1951), *cert. denied*, 343 U.S. 964 (1952), it is said:

"Determinations by an administrative agency should not be reversed . . . merely because the court may have reached another conclusion. They can only be overturned when the administrative action is unreasonable or plainly wrong."

Cases similar to the case here involved have been presented to this Court and to the Supreme Court of the United States. Thus, in *Boesche v. Udall*, 112 U.S. App. D.C. 344, 303 F.2d 204 (1961), *aff'd*, 373 U.S. 472 (1963), there was before the Court a case where the Secretary, relying upon his regulation that "no offer" for a noncompetitive lease "may be made for less than 640 acres except . . . where the land is surrounded by lands not available for leasing under" the Mineral Leasing Act, had cancelled a lease issued under an offer which had been made for less than all land available for leasing. The Court held that the Secretary had the authority to cancel such a lease because of invalidity of the lease at inception (*viz.*, the offer had not been made in accordance with the regulations). Among other things, the Supreme Court said:

"In short, a mineral lease does not give the lessee anything approaching the full ownership

of a fee patentee, nor does it convey an unencumbered estate in the minerals. Since the Secretary's connection with the land continues to subsist, he should have the power, in a proper case, to correct his own errors.

* * * *

"The present case is a peculiarly appropriate one for administrative determination in the first instance. At issue was simply the question whether petitioner's lease offer was defective because it failed to include an adjoining 40-acre tract under application by another party Matters of this nature do not warrant initial submission to the judicial process. Indeed the magnitude and complexity of the leasing program conducted by the Secretary make it likely that a seriously detrimental effect on the prompt and efficient administration of both the public domain and the federal courts might well be the consequence of a shift from the Secretary to the courts of the power to cancel such defective leases.

"Recognition of the Secretary's power here serves to protect the public interest in the administration of the public domain. Cancellation of this kind of erroneously issued lease gives effect to regulations designed to check the undue splitting up of tracts, which might facilitate frauds, hinder the development of oil and gas resources, and render supervision very burdensome." 373 U.S. at 478, 483-84.

In *Southwestern Petroleum Corporation v. Udall*, 117 U.S. App. D.C. 60, 325 F.2d 633 (1963), the Secretary applied the same regulation referred to in the *Boesche* case above, in upholding a lease. The Court said:

"Appellant here does not attack the validity of the regulation. Indeed, in *Boesche v. Udall*, 112 U.S.App.D.C. 344, 303 F.2d 204 (1961), aff'd

373 U.S. 472, 83 S.Ct. 1373, 10 L.Ed.2d 491 (1963), we sustained its validity under different circumstances. Rather, appellant maintains that, in allowing the acceptance of part of an offer to lease while rejecting another part, the Secretary's interpretation of the regulation is erroneous. It is urged that the regulation requires *all* of the available land covered by the offer to be isolated, and that the inclusion of non-isolated land will cause the entire offer to be rejected.

"In *Wright v. Paine*, 110 U.S.App.D.C. 100, 102, 289 F.2d 766, 768 (1961), we said:

" 'Appellees challenge the Secretary's interpretation, not the validity, of the regulation governing the procedures for leasing lands which have become available through relinquishment of a previous lease. His interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 1945, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700. The "courts can intervene only where legal rights are invaded or the law violated." *Chapman v. Sheridan-Wyoming Coal Co.*, 1950, 338 U.S. 621, 631, 70 S. Ct. 392, 397, 94 L.Ed. 393.'

Cf. also *McKenna v. Seaton*, 104 U.S.App.D.C. 50, 259 F.2d 780, cert. denied, 358 U.S. 835, 79 S.Ct. 57, 3 L.Ed.2d 71 (1958).

"Thus, the question in this case is whether the Secretary's interpretation of the regulation is reasonable. Essentially, the question is whether 'the land' referred to in the regulation, as applied to an offer designating separate tracts of land, means all the land in the offer or the land in each of the tracts of the offer.

"It was for the Secretary, the promulgator of the rule, to determine which of the two pos-

sible interpretations was better in accord with the over-all leasing policy of which the regulation is a part. We cannot say that the Secretary's choice of interpretation was unreasonable and, absent such a finding, we cannot disturb his decision." 117 U.S. App. D.C. at 61-62, 325 F.2d at 634-35.

In the case at hand the Secretary applied his regulation (the area of the lease shall conform to the system of public-land surveys) in determining that the section description in the lease (which conformed to the system of public-land surveys), and not the conflicting metes and bounds description in the lease, controlled the area included in the lease.

Here the appellant argues essentially that the Secretary's application and interpretation of his regulation was erroneous. Appellant does not attack the validity of the regulation. As said in the *Southwestern* case, quoted from above, it can here be said that it was for the Secretary, the promulgator of the rule, to determine whether a lease not conforming with public-land surveys was in accord with the over-all leasing policy of which the regulation is a part. The Secretary's choice of applying the rule in this case is not unreasonable, and absent such a finding, the Court cannot disturb his decision.

II

A PROPER CONSTRUCTION OF THE LEASES SHOWS THAT THE SECTION DESCRIPTION CONTROLS OVER THE METES AND BOUNDS DESCRIPTION

Appellant attempts to meet its burden of showing that the Secretary's decision is plainly wrong and unreasonable by arguing (a) that an examination of the leases establishes unequivocally and as a matter of law that the metes and bounds descriptions rather than, as

held by the Secretary, the section designations were controlling, and (b) that the leases are so unambiguous that the Secretary erred in considering any surrounding circumstances in determining the question presented.

A. The Secretary's Decision Must Be Upheld Even Without a Consideration of Surrounding Circumstances.

Intervenors submit that an examination of the leases, even without a consideration of the surrounding circumstances, shows that the decision of the Secretary was reasonable and that under these circumstances the function of the courts is exhausted.

One of the cardinal rules in construing instruments is that the intent of the parties, as gathered from the instrument as a whole, controls as to what was and what was not granted. See 26 C.J.S. Deeds §§ 82-86. Appellant has overlooked this cardinal rule of construction and seeks to isolate certain portions of the leases in question without giving consideration to the instruments as a whole.

In looking only at the leases in question, it is not clear, as contended by appellant, that the metes and bounds descriptions are to control in locating the boundaries of the leases over the reference to such boundaries as certain numbered sections when surveyed. To the contrary, when it is observed that the controversy arose only because the section description and the metes and bounds description are in conflict and when reference is made to the instruments as a whole, it becomes apparent that the sections are to control, and that the purpose of the metes and bounds descriptions is merely to locate the leased premises approximately prior to the making of a survey.

The rider attached to Continental's Lease No. 14-20-603-409, illustrative of the riders in each of the leases pertinent to this case, contains the following provisions:

"Tract No. 97 when surveyed probably will be described as follows:

"Sections 27, 28, 33 and 34, T. 41 S., R. 24 E., S.L.M., and containing a total of *approximately* 2560 acres.

"1. This land was offered on a tract basis and the bids were not on an acreage basis. The acreage herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. No refund or additional payment of rental shall be required to be made because of a difference in the acreage stated and that shown by the survey. Neither shall such a difference in acreage be grounds for any adjustment of the bonus.

"2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U. S. Geological Survey, P. O. Box 6721, Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat." (JA 36-37, emphasis supplied).

Furthermore, in paragraph 3(g) of the leases the lessee specifically agrees "to abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases"

The language in the metes and bounds location, the designation of sections, paragraphs 1 and 2 of the rider, and the regulation (25 C.F.R. § 171.8 (1966)) requiring that the area covered by a lease *shall* conform to the system of public-land surveys, must all be construed together for the purpose of determining what land was leased to appellant. If there is any inconsistency between the separate parts, the inconsistency is to be resolved, if possible, to make all parts harmonious. Appellant contends that only the language in the metes and bounds location shall be considered. Thus, appellant in its contention is violating the cardinal rule of construction that intent is to be determined from all the language used and not by considering an isolated part of the instrument only.

The quoted terms of the leases are inconsistent with appellant's contention in a number of respects. In the first place, those terms state that the tract after survey will probably be described as containing a total of "approximately" 2560 acres. If in fact the metes and bounds description is controlling, as appellant asserts, the word "approximately" would be wholly inapposite, for the result of applying the metes and bounds description would be the delineation of a tract of precisely 2560 acres. Second, and even more significant, are the provisions in the lease riders that the land is offered on a tract and not on an acreage basis, and that the acreage stated is for the sole purpose of computing rentals prior to survey. If in fact the metes and

bounds descriptions in the leases governed there would be no occasion for this painstaking *caveat*, since the making of a survey would have no effect on the acreage conveyed. That this language does, however, have a significant function when the leases are construed to cover sections, in accordance with the system of public-land surveys, is dramatically shown by this very case, where the making of a survey by sections has shown that certain of the tracts leased contain acreage substantially different from the 2560 figure set out in the leases. Construing all parts of the lease together, it is apparent that the interpretation that best gives effect to all its terms is that found by the Secretary.¹

This conclusion is buttressed and confirmed by 25 C.F.R. § 171.8 (1966), which is incorporated into the lease by reference, stating that the area of the lease *shall* conform to the system of public-land surveys. Such a regulation has the force of statute and is binding upon the Secretary. *Caha v. United States*, 152 U.S. 211 (1894); *McKay v. Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F.2d 35 (1955); *Montana Eastern Ltd. v. United States*, 95 F.2d 897 (9th Cir. 1938);

¹ Appellant seeks to make much of the fact that the section descriptions in the leases contain the word "probably", urging that this word can be given effect only by concluding that the leases may not in fact lease sections. What appellant has ignored is that the leases say that the tracts when surveyed will probably be described as particular sections "and containing a total of approximately 2560 acres." As this very case shows, a section survey may show short sections resulting in a significant variation in acreage, and the word "probably" thus serves an important function if the leases are read as conveying sections. Indeed, had the word been omitted, appellant would no doubt be urging that its leases could not be read as conveying by sections because they definitely guaranteed it "approximately 2560 acres."

Seber v. Spring Oil Co., 33 F. Supp. 805 (D.C.N.D. Okla. 1940) It is axiomatic that where there is a conflict between the terms of a lease, or the basis upon which the lease is issued, and the applicable provisions of statutes and regulations issued relating to such lease, the latter will control. See McLane, *Oil and Gas Leasing on Indian Lands* § 84, p. 59. See also *Boesche v. Udall*, 112 U.S. App. D.C. 344, 303 F.2d 204 (1961), *aff'd*, 373 U.S. 472 (1963). Therefore the area to be covered in the leases must conform to the section lines, and since the area covered by a metes and bounds description in this case does not conform to the section lines which were located in accordance with the system of public-land surveys, or to any subdivision thereof, the metes and bounds description must give way to the section description.

The regulation in question was issued under Section 2 of the Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. § 396b, whereby the Secretary of the Interior was authorized to prescribe the terms and conditions under which Indian tribal lands of the kind here involved could be leased. As a part of the over-all leasing policies concerning such lands the Secretary prescribed, among other things, that "The area covered by a lease ... shall conform to the system of public-land surveys." (Emphasis supplied.) This regulation on its face is plainly applicable to the present case, and the Secretary of the Interior has interpreted it according to its terms. Even if the Secretary's interpretation were doubtful, which it is not, the interpretation would be entitled to "controlling weight" unless plainly erroneous. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). And so long as the regulation is in effect it has the

force of law. See, e.g., *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 629 (1950). See also *Seber v. Spring Oil Co.*, 33 F. Supp. 805, 809 (D.C.N.D. Okla. 1940) where it was said:

"The rules and regulations of the Secretary of the Interior concerning oil and gas leases of [Indian Lands] . . . became part of the lease, by express agreement of the parties, and such regulations are controlling."

See also *Udall v. Tallman*, 380 U.S. 1 (1965), where it was said at page 4:

"The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it."

and at page 16:

"To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153 'Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." ' *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."

If appellant's contentions in this case were to be accepted, the area covered by its leases would not, as required by the regulation, conform to the system of public-land surveys, for under appellant's view of its leases the northern boundaries thereof do not run along any township, section or quarter-section lines, or any subdivision thereof, as required under that system, but rather some distance from any such lines. Appellant has not argued that the regulation quoted above is invalid, or that it is not binding on the Secretary. Rather, it has argued that the regulation is inapplicable, despite the mandatory language that the area covered by leases shall conform to the system of public-land surveys and despite the Secretary's holding that the regulation should be applied in accordance with its terms. In effect, appellant argues that the Secretary has made a plainly erroneous interpretation of his own regulation.

As we understand it, the foundation of appellant's argument on this point—and indeed a basic part of its entire argument in this case—is based upon the fact that the lands covered by its leases had not been surveyed at the time the bidding on the leases took place. Starting from this fact, appellant urges that the Secretary must have erred in reading his regulation as applicable because the land might not be officially surveyed for many years, and meanwhile the lessee would not be in a position to enter on and develop his land. Apart from the fact that it is surely for the Secretary rather than the appellant to decide whether this possibility was sufficiently likely, or sufficiently important, to except lands unsurveyed at the time of the lease

from the scope of the regulation, there are fundamental infirmities in this line of argument.²

First, the problem which appellant poses is as to this case a completely false one. Before the leases in question were issued or approved by the Secretary, the area covered by appellant's leases and other leases in the same area was officially surveyed by the Bureau of Land Management and section lines were established on the ground. Indeed, appellant was one of the companies which requested and paid for this survey. Thus even if the regulation could be read as inapplicable if, for example, the Bureau of Land Management neglected or refused to conduct an official survey within a reasonable length of time, that would be no reason for holding "plainly erroneous" the Secretary's interpretation determining it to be applicable here, where such a survey was promptly undertaken at the instance, among others, of appellant itself.

² Appellant also appears to argue that the Secretary's interpretation of his regulation in this case is inconsistent with his prior interpretation of the regulation. Its entire basis for this argument consists of nine leases in which the property is described by metes and bounds without reference to section designations. In fact these leases in no way indicate that the Secretary has ever interpreted his regulation as permitting the leasing of an *area* that does not conform to the *system* of public-land surveys. It is perfectly possible to describe a tract which conforms to the *system* of public-land surveys solely in terms of metes and bounds. For all that appears, that is the case in each of all of the nine leases on which appellant relies.

In any event, the question in this case is whether the Secretary's interpretation of his regulation *here* is "plainly beyond the bounds of reason or authority," and no prior interpretation could disable the Secretary from here applying the regulation in accordance with its letter and its spirit. See *Robertson v. Udall*, 121 U.S.App.D.C. 218, 221, 349 F.2d 195, 198 (1965).

There is also a second distinct, complete and conclusive answer to appellant's argument, which would be controlling even if no official survey had yet taken place even today. This answer lies in the fact that the regulation does *not* require that the area covered by a lease shall be delineated by an official survey, but rather only that that area shall conform to the *system* of public-land surveys. Each of appellant's leases expressly required that prior to drilling the lessee was to have the leased premises surveyed by a registered land surveyor. Each further provided that certified copies of plats of surveys so made were to be filed with the Supervisor, U. S. Geological Survey, and that permission to the lessee to drill would not be granted prior to such filing. Thus it was not merely probable, but certain, that surveys would be conducted prior to development of the lands, and the timing of those surveys was entirely within the control of appellant and the other lessees. A private as well as a government surveyor can readily survey an area in conformity with *the system* of public-land surveys, *i.e.*, in terms of sections, and whether or not an official survey had been previously made, once this was done the area covered by a lease could be identified on the ground in conformity with that system, *i.e.*, by reference to section numbers. That this is so is strikingly demonstrated in this very case by the fact that in 1956, prior to development of its leases, a registered land surveyor acting for appellant did survey its leases in conformity with the system of public-land surveys, and appellant caused to be filed with the Supervisor a survey plat made in terms of designated sections and stating on its face that it was of "the leased premises."

Appellant was from the first free, and indeed bound, before drilling to survey its leased premises. When

that survey was filed and permission given by the Supervisor to drill on the basis of the filing, the physical boundaries of the land covered by the leases were definitely identified. In this case the appellant filed its survey plats showing the area covered by its leases to be the area described in those leases by section. The Supervisor thereupon gave permission to appellant to drill. No delay was caused to appellant's development of its leases by reason of the fact that the area covered by those leases was sections, for appellant would equally have been required to make a survey before drilling had the area covered by its leases in fact been one measured by metes and bounds.

Because of the mandatory regulation referred to above, to interpret the leases as attempting to convey an area measured by metes and bounds would render them ineffective, whereas to interpret them as conveying an area covered by designated sections—an area in conformity with the system of public-land surveys—would give them full effect.

It is well settled that when two interpretations of an instrument are possible one of which will render it invalid, the courts will prefer to adopt the other. *Kelly v. Calhoun*, 95 U.S. 710 (1877); *Foxcroft v. Mallett*, 45 U.S. (4 How.) 353 (1846). As stated in 26 C.J.S. Deeds § 82 at pp. 809-10:

“Provided it is not legally impossible for it to do so, an instrument intended to operate as a deed should so operate, and this rule applies even though the instrument is indefinite and admits of two constructions. Accordingly, an interpretation which will give a deed force will be adopted in preference to one which will make it of no effect. Also, a deed susceptible of two or more interpretations which would be invalid if construed another

way will be so construed as to render it valid, and a deed will not be so construed as to render it a nullity as to any of the parties thereto, if, by any reasonable construction, such result can be avoided.
 . . . ”

We submit that these principles control this case.

Appellant, in Appendix “A” to its brief, cites decisions by the Bureau of Land Management and the Solicitor which, according to the appellant, purportedly hold that a metes and bounds description controls over a “when surveyed will probably be described as” description. All such decisions concern non-competitive lease offers of unsurveyed lands under the Mineral Leasing Act of 1920 and similar acts, which acts are entirely separate and apart from the Act of May 11, 1938 (25 U.S.C. §§ 396a-396g) under which Indian tribal lands, such as those here involved, are leased on a competitive basis. It should also be noted that the Secretary has issued completely different and separate regulations under each such act. Thus, whereas the regulations relating to Indian tribal lands provide that the only area that may be covered in a tribal oil and gas lease is an area which “shall conform to the system of public-land surveys” (25 C.F.R. § 171.8 (1966)), the regulations issued under acts relating to non-competitive lease offers of unsurveyed lands required that the offer contain a description of the lands by metes and bounds (43 C.F.R. §§ 71.2, 192.42(d) (1954)). Therefore, the decisions cited by appellant relating to non-competitive leasing of unsurveyed lands have not even an indirect bearing on the present matter, and it was so indicated in the Secretary’s decision.

In considering the question here presented notice must also be taken of certain deficiencies and ambi-

guities in the metes and bounds descriptions in appellant's leases which raise serious doubts as to whether those descriptions *could* be applied—a fact which surely bears upon the question of whether they *should* be applied.

To illustrate this problem, attention is called to the metes and bounds description contained in appellant's lease covering Tract 97:

“Point of origin to which most of the unsurveyed portion of the following tract is referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument.
...”

“*Tract No. 97*

“Beginning at a point 62,733 feet west along the boundary between the States of Utah and Arizona and 63,360 feet north of the point of origin, thence north 10,560 feet; thence west 10,560 feet; thence south 10,560 feet; thence 10,560 feet to the point of beginning....”

(The metes and bounds description for Tract 88 is identical to the metes and bounds description for Tract 97 except that Tract 88 calls for 73,293 feet west and 63,360 feet north instead of 62,733 feet west and 63,360 feet north.)

It is noted that Tract No. 97 is described as beginning at a “point” west and north of the point of origin. Appellant in its illustration of locating such point (JA 78) makes the assumption that in arriving at this point a surveyor should start at the point of origin (although the description does not call for the starting point of any measurement) and meas-

ure 62,733 feet "westerly," not west along the state boundary, and "thence" 63,360 feet north from such point and not "63,360 feet north of the point of origin." (The point arrived at by such construction is shown as Case I in Exhibit A to this brief.)³

It is, however, just as logical to assume that in locating the point of beginning for Tract 97 a surveyor should start at the "point of origin" and measure to a point 62,733 feet west thereof and "near" the state boundary and thence 63,360 feet north of such point. (The point arrived at by such construction is shown as Case II in Exhibit A and is shown to be 126.8 feet south and 1.42 feet east of the point arrived at in Case I.) A still more logical manner of locating the beginning point for Tract 97 would be to retain the majority of the calls in the description and locate a common point which is 62,733 feet westerly of the point of origin, along the state boundary line, and 63,360 feet north of the point of origin. (The point arrived at by such construction is shown as Case III in Exhibit A and is shown to be 126.8 feet south and 142.8 feet west of the point arrived at in Case I, and 141.38 feet west of the point arrived at in Case I.)

By any construction of the metes and bounds description the exact words of the description cannot be followed and words must be added to or deleted from

³ It is noteworthy that in actuality (as illustrated in its plat on page 6 of Appellant's Brief, and in its second plat filed with the Supervisor, which appellant represented to be a survey of the metes and bounds description) appellant did not use this method in locating the beginning point for Tract 97. For some unexplained reason appellant chose the beginning point for Tract 97 to be the ground position of the southeast corner of Section 34 which is 11.6 feet south and 22.7 feet west of the point arrived at in Case I. (This situation is illustrated in Exhibit B attached hereto.)

words actually used in the description. Under these circumstances, it is submitted that even apart from the controlling principles adduced above, showing that the section description controls over the metes and bounds description, the metes and bounds description is so ambiguous that it must be disregarded altogether, and the only description that can validly be located is the section description.

B. Even if the Question Were Otherwise Doubtful Surrounding Circumstances Fully Support the Secretary's Action.

We have shown above that the Secretary's action in this case can readily be upheld without the necessity of resort to any matter outside the face of the leases themselves. We shall show below that even if the above proposition is assumed *arguendo* to be invalid there is ample basis in the totality of the circumstances for the Secretary's decision.

Appellant urges that it is impermissible to consider surrounding circumstances. In making this argument, the appellant is in effect saying that the Secretary, who is responsible for supervising and approving all Indian leases, errs unless he makes his determination in a case of this kind in a vacuum; that in construing appellant's leases he must close his eyes to the fact that appellant's arguments seek to put in doubt the recognized title not only to intervenors' property, but also to more than 500,000 acres of Navajo Tribal Indian leases bid on at the same time; and that he must overlook the construction freely placed upon the lease descriptions by appellant itself at a time when it was less clearly to its enormous financial advantage to take its present position.

The sole basis for appellant's position is that the leases are not ambiguous as to which description con-

trols, and that since the leases are not ambiguous, no surrounding circumstances can be considered in arriving at their proper construction. We think that preceding portions of this brief at the very least abundantly establish that whatever the leases do, they do not unambiguously convey by metes and bounds. Moreover, appellant overlooks the tendencies of modern decisions to disregard technicalities and to treat all uncertainties in a conveyance as ambiguous which can be cleared up by resort to the surrounding circumstances. (See 26 C.J.S. Deeds § 83, at pp. 814-17 and the multitude of cases indicating such rulings.) We submit that there can be no real question that consideration of all relevant circumstances was proper here, and accordingly we turn to certain highly significant events shown by the record.

Appellant's leases were approved on December 10, 1953, and no drilling was commenced by appellant on such leases for three years, until December, 1956, when the Davis No. 1 Well was commenced. Prior to the drilling of the Davis No. 1 Well, located in the extreme northeast corner of its leases, appellant caused a survey of the boundaries of its leases (Tracts 88 and 97) to be made by one Ernest V. Echohawk, a registered land surveyor. In December, 1956, prior to commencing drilling, appellant filed a plat of such survey with the Supervisor and the Area Director as required by that provision of paragraph 2 of the riders to the leases that requires a plat of "the leased premises" to be filed prior to drilling. The plat showed that the boundaries of the leases coincided and conformed to the lines surveyed and the corners set by the U.S. Cadastral Survey, U. S. Bureau of Land Management, 1953. Thus, the surveys of the boundary lines of Tracts 88 and 97 which were filed by appellant with the Super-

visor and the Area Director showed that (1) appellant had located Tract 88 on the ground and set tract corners so that such tract conformed to the location of Sections 29, 30, 31 and 32; and (2) appellant had located Tract 97 on the ground and set tract corners so that such tract conformed to the location of Sections 27, 28, 33 and 34. No mention was made of any conflict with the metes and bounds descriptions although the plats of these surveys showed that the lower tier of sections in the township were short and that the north-south distances of the tracts were from 624 to 628 feet short of the 10,560 feet (two miles) distance, which was the distance prescribed in the metes and bounds description of the tracts.

These survey plats were accepted by the Supervisor, and appellant thereupon made application to the Supervisor to drill the Davis No. 1 Well at a location 660 feet from the north line and 560 feet from the east line of Section 27, T. 41 S., R. 24 E., S.L.M. Since appellant had complied with the lease requirements by filing a plat of "the leased premises," and since the boundaries were located in the manner prescribed by regulation ("The area covered by a lease . . . shall conform to the system of public-land surveys . . ."), appellant was issued a permit to locate its well as requested. The well was commenced in December, 1956, and was completed as a producer on March 21, 1957.

In the meantime, intervenors had caused their survey to be made in September, 1956, and in locating the boundaries of their leases to the north of appellant's leases, had fixed their south boundary lines at the line later fixed by appellant for its north boundary lines. In June, 1957, three months after the Davis No. 1 Well on appellant's leases had been completed, and during

which time three additional wells were commenced on appellant's leases, intervenors secured permission from the Supervisor to locate their Navajo No. A-1 Well at a location 510 feet from the south line and 2,140 feet from the east line of Section 22, T. 41 S., R. 24 E., S.L.M. Such well was completed July 31, 1957, as a producer, and on August 14, 1957, appellant made known its claim to the south 624-foot strip of intervenors' leases by attempting to substitute a new plat for the original plat filed in December, 1956. Such claim was the first mention by appellant of such discrepancy for a period of approximately four years subsequent to the time it was on notice by participating in the BLM Survey in 1953, that the metes and bounds descriptions for its tracts did not conform to the section lines, and was in direct conflict with its previous claim and actions showing that its leases conformed to the system of public-land surveys in the area.

It is a striking fact that if appellant's present position as to the area covered by its leases were to be accepted, it would necessarily follow that appellant had directly violated one of the express provisions of those leases and rendered them subject to cancellation in their entirety. Thus, as stated above, each of appellant's leases specifically provides:

"Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed Certified copies of the survey plats must be filed in duplicate Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs." (JA 34-35, 37).

The only survey plats filed by appellant before it commenced drilling on its leases were those filed in

December, 1956, based on the section descriptions in the leases. Thus appellant is caught squarely on the horns of a dilemma; either the plats filed showing sections were surveys of the "leased premises," as appellant represented them to be, or they were not such surveys, in which event appellant is in clear and flagrant default of its lease obligations.

Under these circumstances, the filing of appellant's survey plats in December, 1956, showing that its leases conformed to the system of public-land surveys in the area is a significant contemporaneous construction of its lease boundaries. Appellant's construction was concurred in by the Supervisor when on the basis of it he gave appellant permission to drill wells on such described lease. It has frequently been held that contemporaneous construction of the description by the parties in locating deeded or leased land by survey should be given very great weight. See *Humble Oil & Refining Co. v. Kirkindall*, 119 S.W.2d 731 (Tex. Civ. App. 1938), *aff'd*, 145 S.W.2d 1074 (1941); *Gotee v. Feldpausch*, 220 Ky. 81, 294 S.W. 813 (1927); *Weniger v. Ripley*, 134 Ore. 265, 293 P. 425 (1930); *Wood v. Ashby*, 122 Utah 580, 253 P.2d 351 (1952); *High Gravity Oil Co v. Southwestern Petroleum Co.*, 290 Fed. 370 (6th Cir. 1923).

In addition, in view of the fact that all the parties here concerned had for a period of four years treated the surveyed sections as constituting the lease boundaries, in construing the written lease there comes into play the familiar rule that "In the construction of written instruments . . . when the language is open to doubt, and parties whose interest are diverse have from the outset adopted and acted upon a particular construction, such construction will be of great weight with

the court, and will usually be adopted by it." *Maxwell-Davis, Inc. v. Hooper*, 317 Mass. 149, 152, 57 N.E.2d 537, 538 (1944); *New England Foundation Co. v. Commonwealth*, 327 Mass. 587, 597, 100 N.E.2d 6, 10 (1951); *Simons v. American Dry Ginger Ale Co.*, 335 Mass. 521, 524, 140 N.E.2d 649, 652 (1957); *Restatement, Contracts* § 235 (e).

Thus even if it is assumed that the leases on their face are not decisive against appellant's contention, the facts just adverted to supply ample support for the decision of the Secretary.

III.

NO PREJUDICE OF INTERIOR OFFICIALS SHOWN

In subsections C and E of Section I of Appellant's Brief, the appellant alludes to certain departmental officials' alleged failure to seek a judicial determination and in effect claims that such officials had prejudged the legal and policy issues involved. It is noted that this charge is made not against the Secretary who made this decision, but against the action of the Acting Commissioner of Indian Affairs after the matter had been submitted to the Secretary's office. The *only* point made by appellant in this regard was a letter from the Acting Commissioner to the Area Director asking for signed copies of the oil companies' agreement to the survey "As it would greatly support our contention in the case" (JA 117).

As pointed out in 2 Davis, *Administrative Law* § 12.01 (1958), prejudice or bias in the sense of a crystallized point of view about issues of law or policy is no ground for disqualifying a person operating in a judicial function. In fact with a 1938 regulation saying that a lease of the kind involved is to cover an area that conforms to the public-land survey, it is difficult to say

that any Interior official would be prejudiced in feeling that such a regulation would control in the case. He may be convinced of the rightness of such position as a matter of law or policy, but not prejudiced.

In fact, the record, when reviewed as a whole, shows that although from the beginning it appeared certain to the Interior officials that the section description would control because of the regulation, a continual investigation was made of the surrounding circumstances to uncover any equitable ground which would militate against control by the regulation. None was uncovered, and the regulation was applied.

IV.

PROPER PARTS OF RECORD TO BE PRESENTED TO COURT TO REVIEW ADMINISTRATIVE DECISION

In Section V of its Brief, appellant attempts to support its position that certain materials should not have been included in the administrative record.

Where an agency has conducted a full-scale, formal hearing, it is agreed, as stated by appellant, that the appropriate record for review consists only of the pleadings and the transcript of the testimony taken at the hearing. However, where no formal hearing was held at the administrative level, appellant cites no case as to what may properly be included in the administrative record that goes to a court for review.

In *Northwest Bancorporation v. Board of Governors*, 303 F.2d 832 (8th Cir. 1962), the Court reviewed a record made on an informal level based on facts, data, theory and argument. In *Bank of Sussex County v. Saxon*, 251 F. Supp. 132 (D.N.J. 1966), the entire informal administrative file was reviewed, exclud-

ing only certain memoranda which the agency asserted to be privileged. Therefore, it appears proper in a case of this nature, where no formal hearing was held, to include in the administrative record all writings which the Secretary considered in making his determination.

CONCLUSION

Intervenors submit that the decision of the Secretary in this case was reasonable and based upon a long-standing regulation, sound principles of law and reasoned judgment. The action of the United States District Court for the District of Columbia dismissing the case and holding that appellant take nothing should be affirmed.

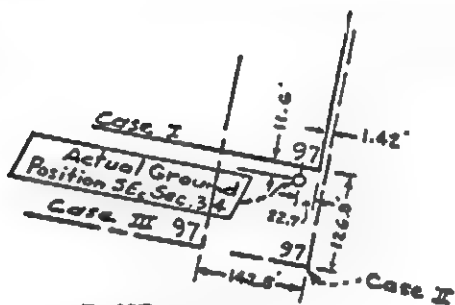
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DETAIL AT
S.E. COR. TRACT 97

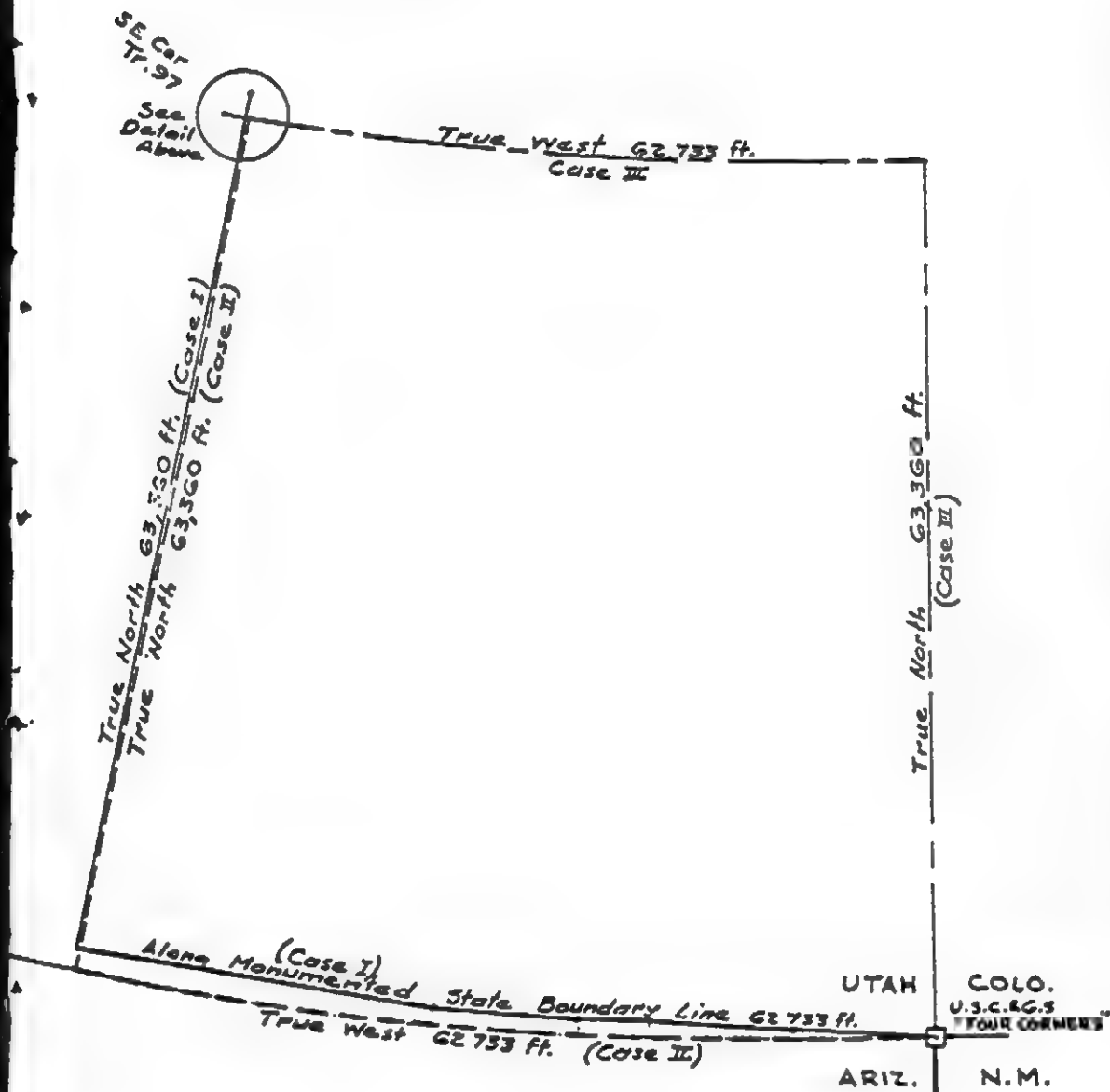
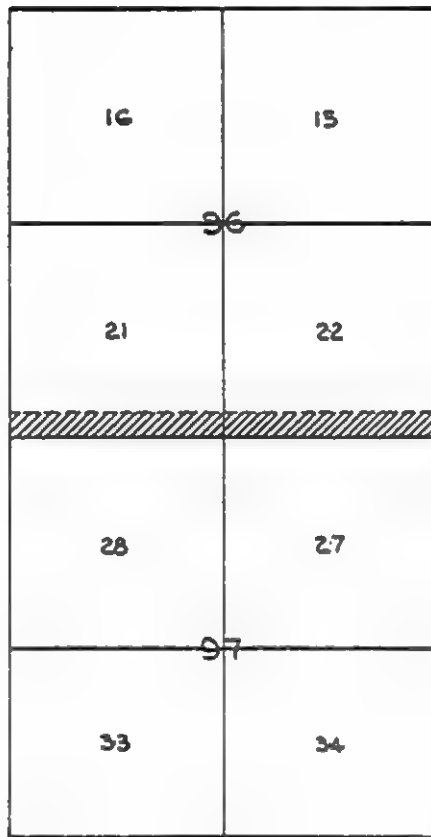


EXHIBIT "A"

R. 24 E.

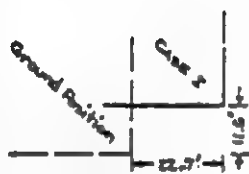


T.

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S.

CASE 3, EXHIBIT 'A'



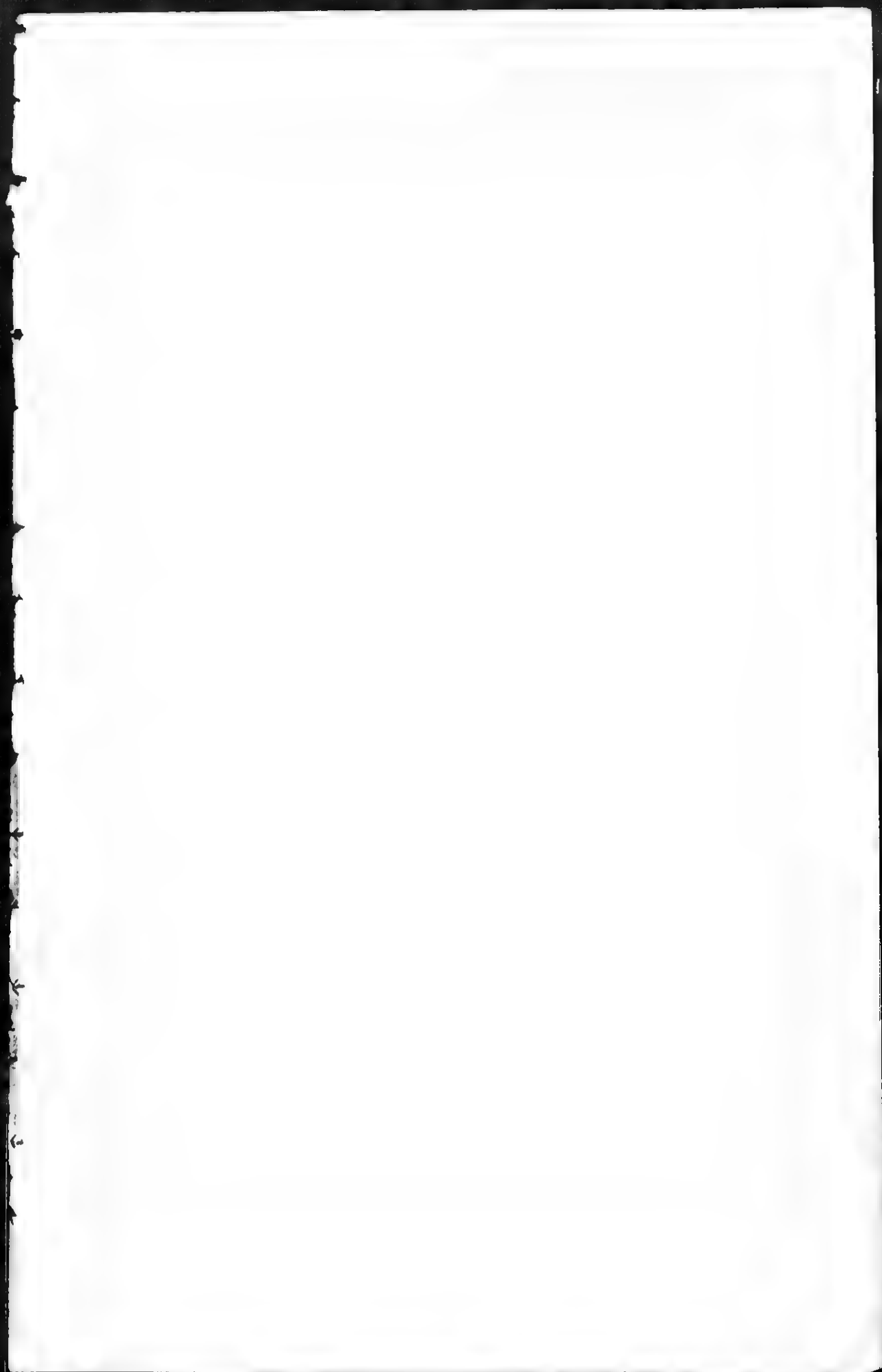
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UTAH
ARIZONA

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COLORADO
N. MEX.

EXHIBIT 'B'



BRIEF FOR STEWART L. UDALL,
SECRETARY OF THE INTERIOR, APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,362

CONTINENTAL OIL COMPANY, Appellant

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

and

PHILLIPS PETROLEUM COMPANY

and

AZTEC OIL & GAS COMPANY,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

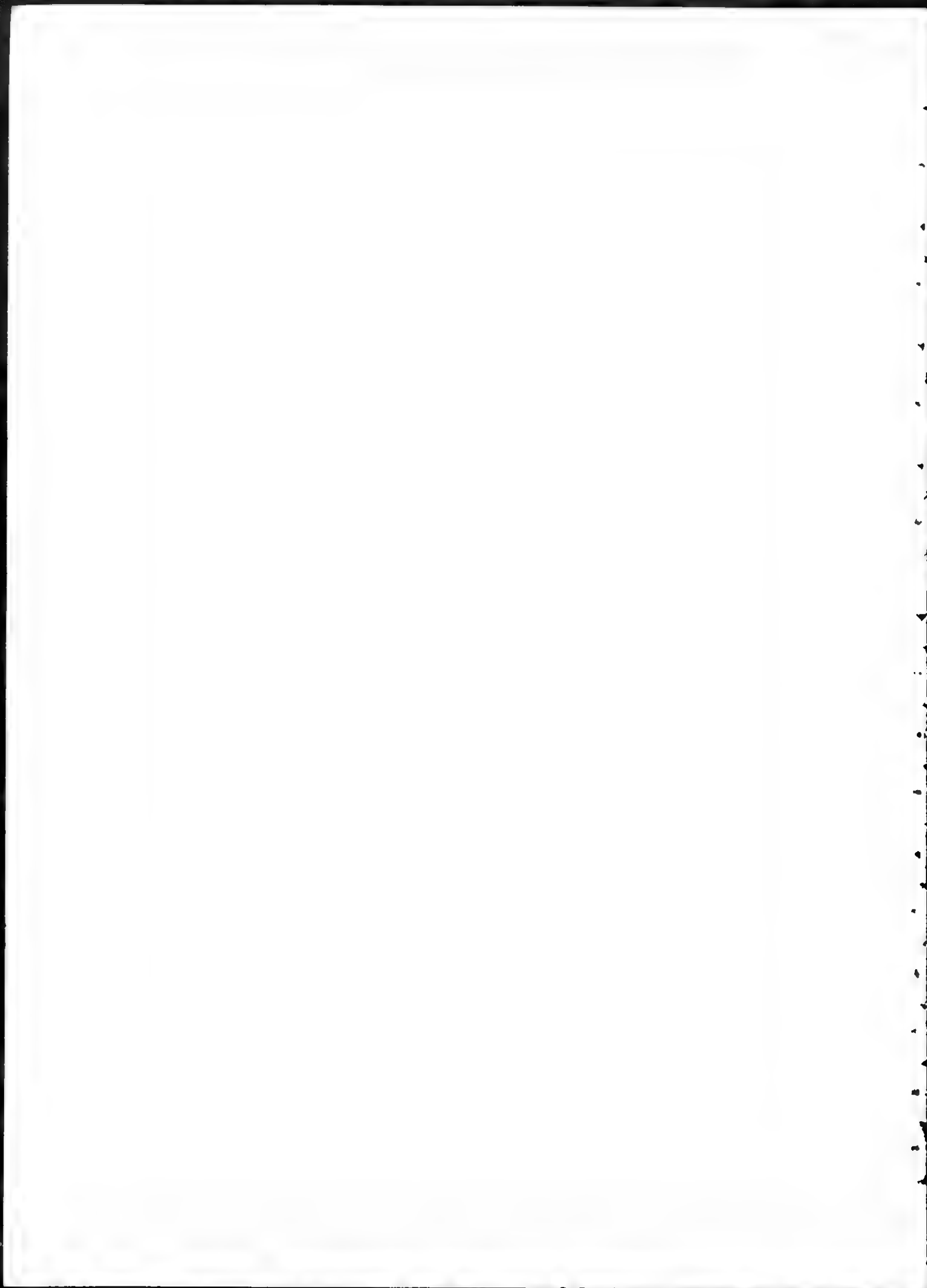
United States Court of Appeals
for the District of Columbia Circuit

EDWIN L. WEISL, JR.,
Assistant Attorney General.

FILED NOV 1 1966

Nathan J. Paulson
CLERK

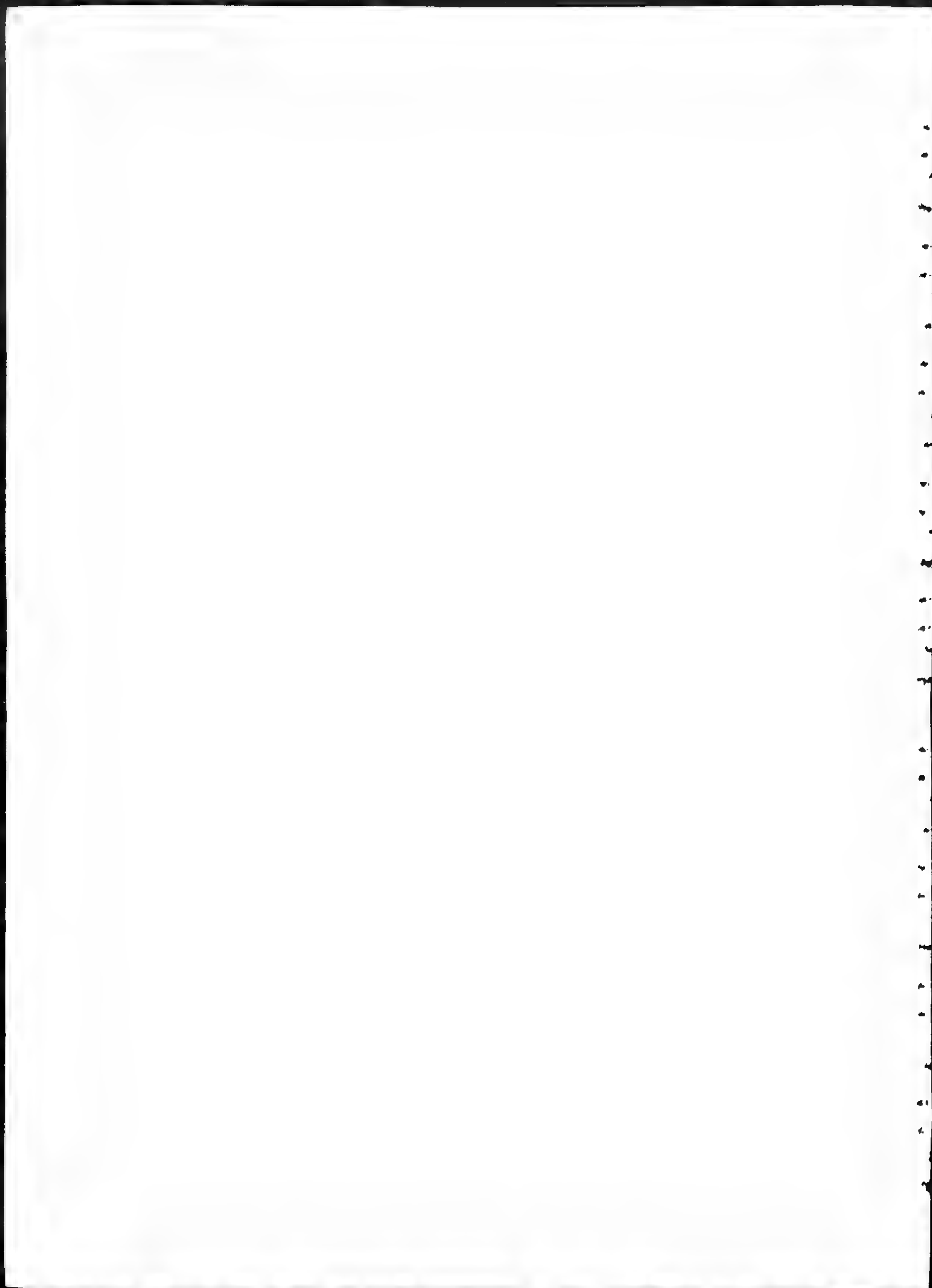
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QUESTION PRESENTED

1. Whether the Secretary of the Interior's determination that an oil and gas lease of Indian tribal lands to appellant was to be located on the ground by public land section numbers rather than by metes and bounds was clearly wrong.

2. Whether the administrative record reviewed by the district court was correct in its contents.



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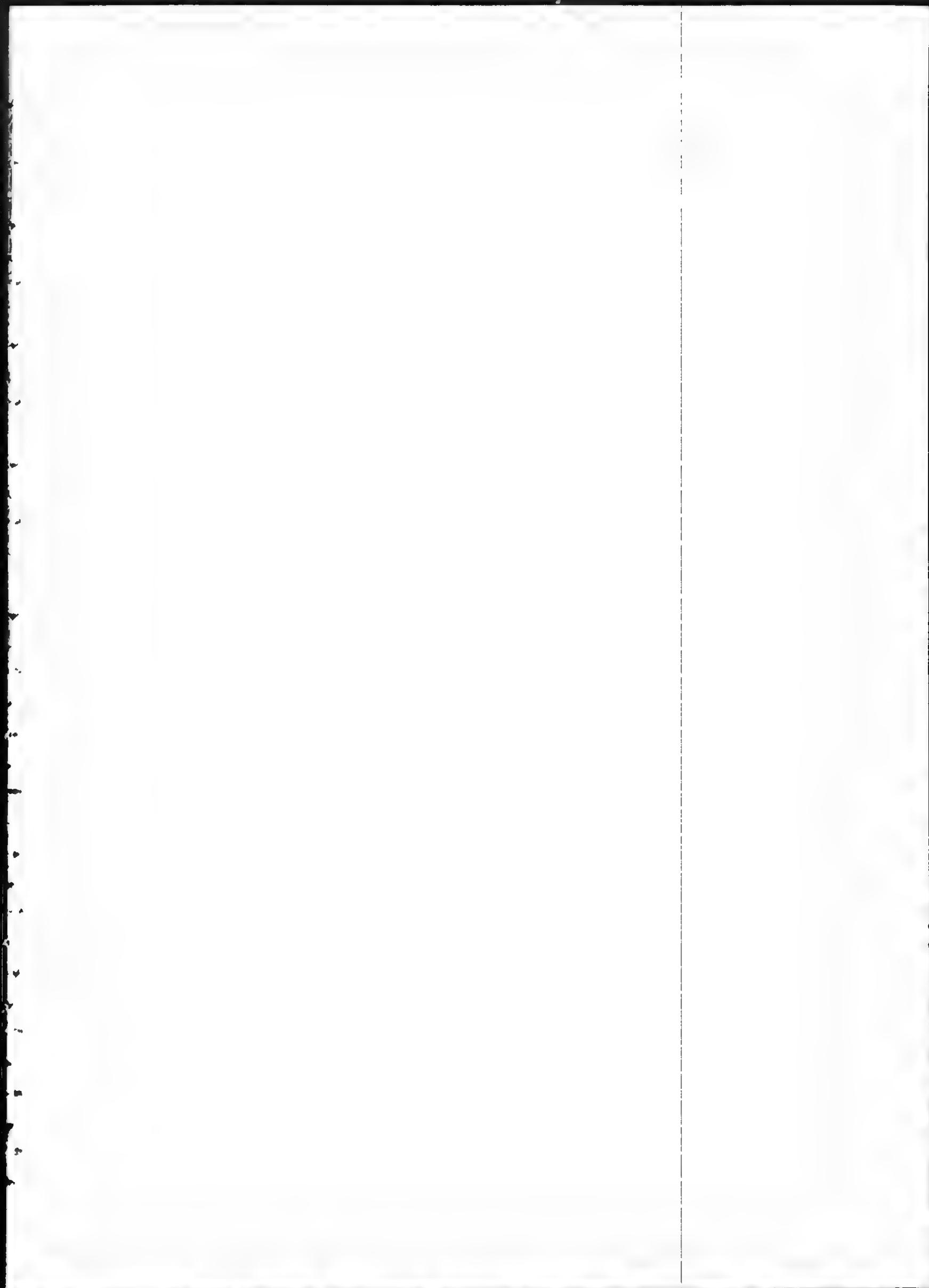
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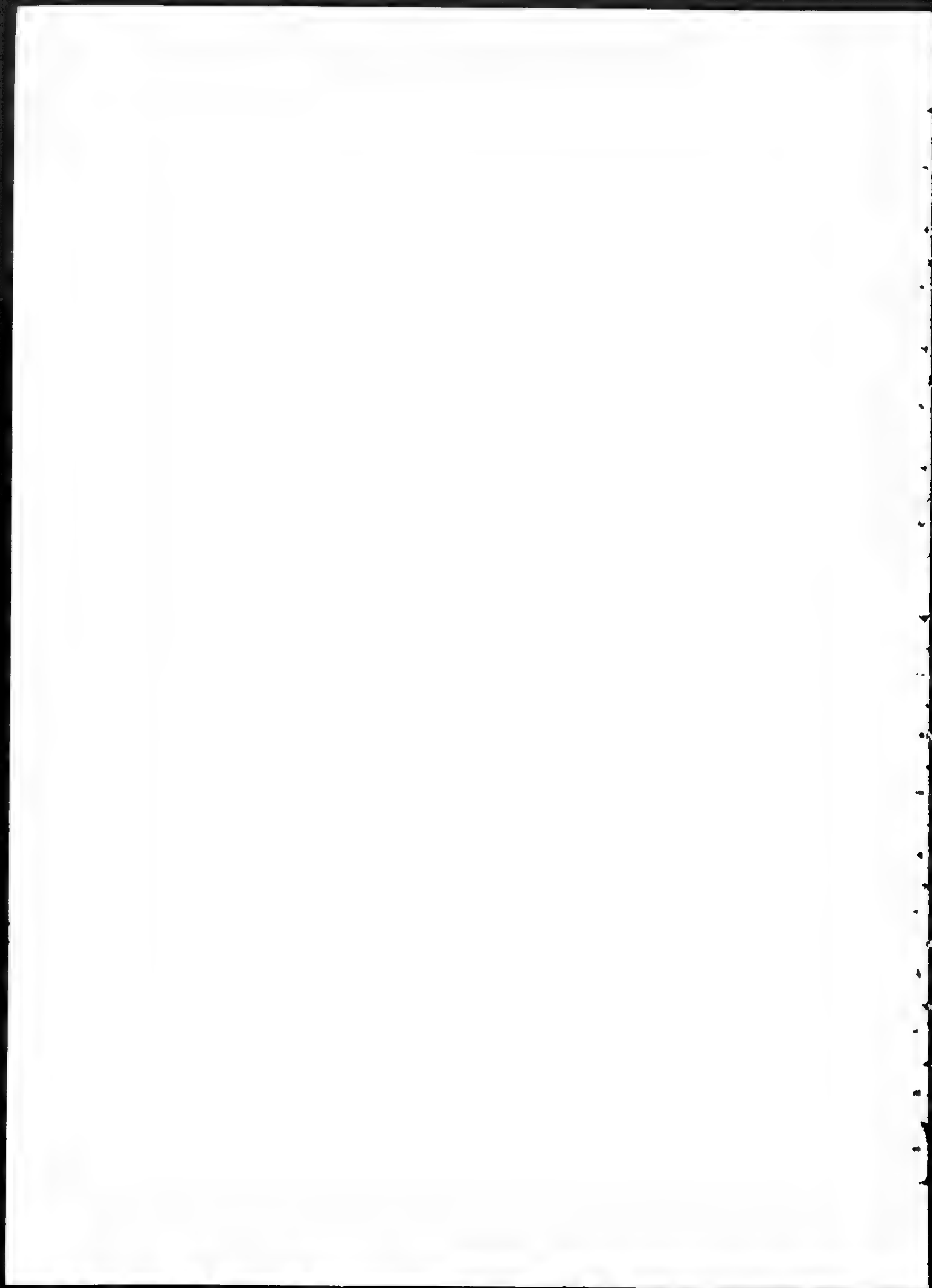
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,362

CONTINENTAL OIL COMPANY, Appellant

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

and

PHILLIPS PETROLEUM COMPANY

and

AZTEC OIL & GAS COMPANY,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR STEWART L. UDALL,
SECRETARY OF THE INTERIOR, APPELLEE

OPINION BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law are set out at pages 165-166 of the Joint Appendix.

JURISDICTION

Jurisdiction of the district court was invoked under Title 11, Section 306, of the District of Columbia Code; Section 10 of the Administrative Procedure Act, 60 Stat. 243,

5 U.S.C. sec. 1009; and the Declaratory Judgments Act, 28 U.S.C. secs. 2201 and 2202 (JA 3). Judgment of the district court dismissing the action was entered on April 29, 1966 (JA 167). Notice of appeal was filed June 24, 1966 (JA 168). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

STATEMENT

The Navajo Indian Tribe, with the approval of the Secretary of the Interior, issued oil and gas leases on contiguous lands to appellant and intervenors-appellees. This case involves a dispute over the location of the common boundary between them. The lands are tribal lands on the Navajo Indian Reservation in Utah, near the Arizona, Colorado and New Mexico boundaries. The facts are as follows:

On March 24, 1953, the local office of the Department of the Interior's Bureau of Indian Affairs advertised an oil and gas lease sale (by competitive bidding) for Navajo tribal lands in Arizona and Utah. The area was large, totaling over 528,000 acres (JA 16). Part of the area had been surveyed in accordance with the standard public land rectangular survey system and part of it was unsurveyed. The area was offered for leasing by numbered, rectangular tracts. There

were 214 such tracts (JA 16). Where a tract was in a surveyed area, it followed the usual description of certain sections in a particular township and range. Where a tract was in an unsurveyed area, it was first described by metes and bounds. The courses were all due north, west, south and east and the distance on each course was 10,560 feet, which is the measure along each side of a block of four, standard, square, public land sections. Then the description stated that the tract "when surveyed probably will be described as follows:" and a section, township and range designation was given. Each description included a statement of the approximate acreage. In most instances, the acreage stated was "approximately 2,560 acres," which is the total of four, standard, 640-acre sections. In some instances, where fractional sections were referred to, the acreage was slightly less.

The descriptions were further tied to the standard survey system by the following paragraph in the advertisement (JA 155):

Point of origin to which most of the unsurveyed portion of the following tracts are referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.

The advertisement (and the leases subsequently issued) provided that the land was offered on a tract basis, not on an acreage basis, and that the acreage stated was for the purpose of computing annual rentals prior to survey of the land (JA 18, 34, 36). They further provided (JA 19, 34, 37):

2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U. S. Geological Survey, P. O. Box 6721, Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat.

In addition, they provided that the leases were subject to the existing or future regulations of the Secretary of the Interior issued under authority of the Act of May 11, 1938, 52 Stat. 347 (JA 17, 42, 92). The Secretary's regulation of May 31, 1938, 25 C.F.R. sec. 186.8 (now sec. 171.8), provides:

The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys
* * *.

On May 1, 1953, appellant, Continental Oil Company, submitted successful bids on two tracts of the unsurveyed land offered for sale. They were Tract No. 88 which (following a metes and bounds description) "when surveyed probably will be described as * * * Sections 29, 30, 31 and 32 of T. 41 S., R. 24 E., S.L.M." and the contiguous tract to the west, No. 97, which (following a metes and bounds description) "when surveyed will probably be described as * * * Sections 27, 28, 33 and 34 of T. 41 S., R. 24 E., S.L.M." (JA 25, 27). At the same time, intervenors' predecessor in interest bid in the two tracts immediately to the north of these and having a common boundary between them (JA 38-39). They were Tracts Nos. 87 and 96 and were comparably described.

On June 25, 1953, prior to execution and approval of the leases herein involved, a group of oil companies requested that a public land survey be made of the area by the Bureau of Land Management. Such survey was to be of township boundaries only, with section and quarter section corners established on the perimeter, but was not to include an interior section survey. This survey was made by the Bureau between August 7, 1953, and November 3, 1953.^{1/} It was pointed out in the preliminary discussions that, with the township boundaries established, any private or company surveyor could locate wells and the lease tract boundaries within such township. The oil companies, of which Continental was one, paid for the Bureau of Land Management survey (JA 42).

The Special Instructions for this survey, issued on July 28, 1953, by the Bureau of Land Management's Division of Cadastral Engineering, stated (JA 160-162):

METHOD OF PROCEDURE

The diagram accompanying these instructions delineates in general the procedures to be followed. The plan is designed to satisfy BLM survey procedures and provide maximum compliance with the oil and gas leases as described in this sale offer by the Bureau

^{1/} This survey was approved by the Director of the Bureau of Land Management on May 10, 1954.

of Indian Affairs. Tremendous values may be involved. Accordingly, the survey must not depart materially from the leases as described. However, we are confronted with one substantial discrepancy at the start. It is unfortunate that whoever wrote the lease descriptions evidently was not aware of a shortage of some 7,40 chains in the record length of the east boundary of T. 43 S., R. 26 E., but instead considered the line to be a full six miles long. This creates a situation whereby there will be conflicts between many of the lease descriptions because some are described from lines and corners of the Page and Lentz surveys while others are controlled in position by measurements from the Four-Corners Monument. The procedures herein provided are designed to eliminate the conflicts. However, a limited number of the leases unavoidably will suffer a reduction in area while a few others will be shifted in position. These matters have been discussed fully with the chairman of the survey committee of the oil companies.

* * * * *

The corner of Ts. 41 and 42 S., R. 24 E. is intended later to be placed on the W. boundary of T. 41 S., R. 25 E., 12 miles distant from the Utah-Arizona line and is expected to result in a fractional distance in the south half mile on the E. boundary of section 36, T. 41 S., R. 24 E.

* * * * *

* * * Fractional measurements are to be placed * * * in the most southerly half mile on the east boundary of T. 41 S., R. 24 E.

The northeast part of Township 41, involved here, had been previously surveyed officially and the township and section lines had been laid out. Hence, an adjustment had to be made for the north-south shortage referred to in the instructions, supra, and, as indicated there, an adjustment was made in the south tier of quarter sections across this township (JA 162-163). This adjustment had the effect of moving the common boundary between Continental's tracts and Phillips-Aztec's tracts 624 feet south into Continental's area, as indicated by the metes and bounds descriptions. Since their common boundary extends for four miles, this amounts to about 300 acres (JA 39, 42).

Leases to Continental (dated October 13, 1953) were approved by the Secretary on December 10, 1953,^{2/} and leases to intervenors' predecessor (dated October 27, 1953) were approved on January 8, 1954^{3/} (JA 30, 33, 64).

Thereafter, in December 1956, pursuant to the requirement that prior to drilling a well a lessee must have a survey

^{2/} Indian Lease No. 14-20-603-407 for Tract 88 and No. 14-20-603-409 for Tract 97.

^{3/} Indian Lease No. 14-20-603-353 for Tract 87 and No. 14-20-603-355 for Tract 96.

made of the leased premises and file with the Regional Oil and Gas Supervisor of the United States Geological Survey a plat of such survey, Continental filed a survey plat showing its tract in terms of the surveyed public-land sections (without conflict with the Phillips-Aztec leases) and showing the section corners monumented with iron pipe stamped with the section information.^{4/} The lower (southern) tier of quarter sections was shown to be short. On this basis it applied for and was given permission to drill the Davis No. 1 well in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27 on Tract 97. This well became a producer in March 1957, it being the discovery well in the White Mesa Field (JA 39, 42, 45). This discovery, of course, generated drilling activity in that vicinity.

In August 1957, Continental filed with the Supervisor a second plat. This one showed its lease boundaries in terms of the metes and bounds description (JA 39, 45). Subsequently, Continental sought permission to drill within the 624-

^{4/} Phillips had filed such a plat in September 1956, as to its tracts, which conformed to the public land survey and showed that the boundaries were posted with substantial monuments.

foot-wide strip (shown by its second plat to be within its leasehold) and urged denial of a permit sought by Phillips-Aztec also to drill there. The Supervisor submitted the issue of the land included in the two leases to the General Superintendent of the Navajo Indian Agency. The Superintendent on July 3, 1958, held that (JA 82):

It was the intent of this Agency and, we believe, of the Navajo Tribe that all leases in unsurveyed areas of Navajo Tribal lands would conform to the public land survey by section, township and range. This was the basis for offering such lands for lease, as required by regulation of the Department contained in Title 25, C.F.R., Part 171.8.

This opinion was concurred in by the Chairman of the Navajo Tribal Council and approved by the Area Director of the Gallup, New Mexico, Area Office. On this basis the Supervisor granted the permit to Phillips-Aztec and Continental appealed to the Commissioner of Indian Affairs (JA 83-87).

The Commissioner upheld the use of the public lands sections, as opposed to the metes and bounds description (JA 90-95), and this ruling was sustained by the Secretary of the Interior (JA 38-46). Continental then instituted the present action. The district court held that the Secretary's decision was lawful and was supported by substantial evidence in the administrative record (JA 165-166). This appeal followed.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. secs. 396b-396e, provide:

SEC. 2. That leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

SEC. 3. That hereafter lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of the Interior,

guaranteeing compliance with the terms of their leases: Provided, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

SEC. 4. That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

SEC. 5. That the Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

The pertinent regulation of the Secretary of the Interior issued under the foregoing statute appears at 25 C.F.R. sec. 171.8 (formerly sec. 186.8) and provides:

The area covered by a lease shall be in a compact body and shall conform to the system of public-land surveys, except that leases covering lode ground may consist of one or more adjoining parallelograms 1,500 feet in length by 600 feet in width, as provided by the United States mining laws. No lease under the regulations in this part shall convey any extralateral rights, and no coal lease shall have a length exceeding 1 mile along the outcrop.

SUMMARY OF ARGUMENT

I

The only jurisdiction here is a suit in the nature of mandamus. The Supreme Court has held that the writ of mandamus should "not be so perverted as to make it serve the purposes of an ordinary suit." This Court has held that a decision of the Secretary of the Interior may not be overturned by the courts unless it is "plainly beyond the bounds of reason and authority." That is the test to be applied here.

II

The Secretary applied the correct standard in construing the leases. Appellant's leases were not isolated ones. A vast area of land (528,000 acres) was being offered for leasing. In such a large undertaking, there was necessarily a leasing scheme. This essential and obvious fact alone justifies construing the leases against the background of the overall transaction.

III

The leasing scheme is plainly shown in the advertisement for the lease sale and in the lease provisions. It supports the Secretary's construction of the leases. The tracts offered were tied to existing, adjacent public land surveys. Each tract comprised four numbered sections. The metes and bounds descriptions described squares of four, standard sections.

The advertisement and the leases required a survey of each tract "tied" to the adjacent public land survey and that the "boundaries [be] posted with substantial monuments." These monuments were obviously intended to be permanent section corners. It would be highly confusing to have two different sets of substantial monuments (slightly offset from each other) and especially if each were marked with the same township and section numbers.

The advertisement and leases provided that the land was offered on a tract basis, not an acreage basis, and that the stated acreages were solely for the purpose of computing rental prior to survey. If it were intended that the metes and bounds descriptions were to govern, this provision was not

necessary. The acreage could be readily computed. But the acreage within sections is sometimes subject to adjustment, as here, because of particular problems that exist or develop during survey.

Finally, the advertisement and leases incorporated the existing and future regulations of the Secretary. One of the regulations then and now in force, respecting the leasing of Indian tribal lands, provides that "The area covered by a lease shall conform to the system of public-land surveys * * *." The reasonable assumption must be that it was intended that this regulation would be followed. Appellant's contention that it could not apply to unsurveyed lands is without merit here where the leases specifically required a survey in conformity with and tied to the system of public land surveys and where the tracts were described by probable public land section numbers.

Hence, the terms of the advertisement and leases, without more, provide ample support for the Secretary's holding that the tracts were leased by sections when surveyed. Even so, there is strong additional support for that result in the conduct of the parties in construing the leases before and after they were executed. Appellant and other oil companies

requested and paid for an official Bureau of Land Management Survey of the townships in the area to be leased. The survey was made with section corners marked on the perimeter of each township. Thereafter, in compliance with the requirement that a lessee have his tract surveyed and a plat filed before applying to drill a well, appellant had such a survey made and filed a plat showing its tracts as sections measured from the established official corners. On that basis, it received permission to drill and drilled a producing well. It did not file a plat by metes and bounds until some eight months after filing the first one. This is strong indication (1) of an understanding that the public land survey was requested for some other purpose than merely to give a closer tie-in point for a metes and bounds survey and (2) that it is perfectly rational to read the leases as meaning that the area conveyed was to be ascertained by reference to the section numbers of the official survey.

IV

This case must be tried on the administrative record. The Secretary properly considered the administrative file which had accumulated on this matter. And it was essential for intelligent review that the district court have before it all the material which the Secretary considered in reaching his determination.

ARGUMENT

I

JURISDICTION AND THE SCOPE OF
JUDICIAL REVIEW

Appellant alleged Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. sec. 1009, as a ground for jurisdiction of the district court. But, we submit, that Act is not a jurisdictional statute. Almour v. Pace, 90 U.S. App.D.C. 63, 193 F.2d 699 (1951); Kansas City Power & Light Co. v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924 (1955), cert. den., 350 U.S. 884; Ove Gustavsson Contracting Company v. Floete, 278 F.2d 912 (C.A. 2, 1960); Chournos v. United States, 335 F.2d 918 (C.A. 10, 1964). Similarly, the Declaratory Judgment Act, 28 U.S.C. secs. 2201, 2202, provides merely an additional remedy, not jurisdiction. Hence, the only jurisdiction here available to appellant is an action in the nature of mandamus.

Mandamus requires strict and limited standards of judicial review. Its function is to "enforce ministerial duties of executive officers by ~~mandates~~ of Congress." Trans-continental & Western Air v. Farley, 71 F.2d 288, 291 (C.A. 2, 1934). The writ of mandamus should not "be so perverted as to

make it serve the purposes of an ordinary suit." International Contracting Co. v. Lamont, 155 U.S. 303, 309 (1894). Mandamus can succeed only if the action of the officer is "illegal." Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949).

In judicial review of actions by the Secretary of the Interior, it has been repeatedly held that his decision may not be overturned by the courts if it is "not plainly beyond the bounds of reason or authority" or "not clearly wrong." Robertson v. Udall, 121 U.S.App.D.C. 218, 349 F.2d 195 (1965); Udall v. Tallman, 380 U.S. 1 (1965); Boesche v. Udall, 373 U.S. 472 (1963); Hammond v. Hull, 76 U.S.App.D.C. 301, 131 F.2d 23 (1943), cert. den., 318 U.S. 777; McKenna v. Seaton, 104 U.S. App.D.C. 50, 259 F.2d 780 (1958), cert. den., 358 U.S. 835; Safarik v. Udall, 113 U.S.App.D.C. 68, 304 F.2d 944 (1962); Wright v. Paine, 110 U.S.App.D.C. 100, 289 F.2d 766 (1961). That is the test which must be applied here.

II

THE SECRETARY APPLIED THE CORRECT STANDARD IN CONSTRUING THE LEASES

The issue here is the location of the external boundaries of the lands embraced in the appellant's leases.

Appellant seeks to resolve that issue by forbidding consideration of anything except the allegedly "clear and unambiguous" language of the land descriptions in the leases. Clearly, under the circumstances obtaining here, the issue may not be so narrowly approached.

Appellant's leases were not isolated ones. A vast area of land (528,000 acres) was being offered for leasing. In such a large undertaking, there was necessarily a leasing scheme. This essential and obvious fact alone justifies construing the leases against the background of the overall transaction.

In State of Wyoming v. United States, 310 F.2d 566 (C.A. 10, 1962), cert. den., 372 U.S. 953, involving a public land resurvey of a large area, the court rejected a narrow argument, comparable to that made by appellant here, stating (p. 569):

We disagree with the contention of counsel for appellants that we should consider only that part of the evidence which is specifically applicable to the 9 sections remaining in controversy in this action. The resurveys of the townships in which such sections were located were not isolated surveys, separate and apart from the resurveys

of the other townships, made under the same or like Congressional authority and for the same reasons and purposes. On the contrary, the resurveys of such townships were a part of an overall plan to correct errors in earlier surveys of many townships. Hence, the conduct of the State and of the United State, with respect to the resurvey of other school sections, was pertinent to show the relative course of action of each in the carrying out of such overall plan and the reliance of the United States on such State conduct.

See also United States v. Southwest Potash Corporation, 352 F.2d 113, 116 (C.A. 10, 1965), cert. den., 383 U.S. 911.

Appellant, as a participant in the large transaction here, must be held to the facts and circumstances surrounding the transaction which it knew. Appellant itself acknowledges the validity of this when it states in its brief (p. 23) that the conditions in the leases "should be read in the context of the whole situation." Hence, the circumstances of this transaction render irrelevant the decisions relied upon by appellant (Br. 20, 24-27, 33) which contain no similar elements.

III

THE FACTS SUPPORT THE SECRETARY'S CONSTRUCTION OF THE LEASES

The leasing scheme is plainly shown in the advertisement for the lease sale and in the lease provisions. That

scheme was to "tie" the tracts into the existing, adjacent public land surveys and to lease, in square blocks, four sections for each tract which, it was expected, would be at the locations shown in the metes and bounds descriptions. Obviously, great "office" effort was expended in projecting the existing, adjoining public land surveys into this area and attempting accurately to locate and describe each section both by number and by metes and bounds. It is almost impossible to divide evenly, by metes and bounds description, a large area of unsurveyed land lying between a state boundary and a standard parallel or guide meridian. This is because the actual distance between a state boundary and a given parallel is not always the correct theoretical distance. As the Commissioner of Indian Affairs said in his decision of October 27, 1958 (JA 93):

United States public land surveys divide large tracts of land into 6-mile square townships until state lines, standard parallels of guide meridians are reached. The townships on the sides closing against the previously established lines are generally smaller than standard size. Thus, some of the 36 sections into which a township is divided, must be smaller than the standard one-mile square section. Adjustment in the size of some sections must also be made for the convergence of meridians

which are true north-south boundary lines. Requirement No. 1 of the rider to the leases, quoted above, was inserted because the fact, that some exterior sections of townships when surveyed have to be of varied size, was commonly known. The acreage of these closing sections as well as the metes and bounds description of the perimeter varies with the size of the sub-standard sections. For this reason, the metes and bounds description was used only to locate the unsurveyed lands as closely as possible until surveyed.

The plan or scheme was of broader application than to appellant's tracts alone and was one into which these tracts, of necessity, must fit.

It is true that the private surveys originally provided for would not be official unless checked and approved, but the requirements that a "registered land surveyor" be used and that the "boundaries [be] posted with substantial monuments" show the intention that such surveys would serve the function of official public land surveys, dividing the area into specific townships and sections.

It is clear that it was intended that such surveyor, like anyone surveying in the public land area of the West, should follow the regular public land surveying system. Indeed, otherwise, it would be highly confusing to have two

different sets of substantial monuments in the area and especially if each were marked with the same township and section numbers. It would be patently ridiculous to assume an intention in the leasing scheme that there would be one monumented, grid survey of this vast and remote area and, subsequently, another monumented, grid survey superimposed in a slightly offset fashion. The survey and substantial monumentation requirements and the great effort made to locate the sections by projection from the existing official surveys refute this. As the Secretary said (JA 43):

"It was clearly indicated that a survey was to be made which would describe the leased areas by sections rather than by the original metes and bounds descriptions." The boundaries of the "leased premises" were to be surveyed and substantially monumented and they were intended to be section monuments. It must be remembered that the monuments on the ground represent the survey of the particular section for all purposes, not simply for these leases.

The intention to lease by surveyed sections is further indicated by the acreage condition in the advertisement and leases. It provided that the land is offered on a tract

basis, not on an acreage basis, and that the stated acreages were solely for computing rental prior to survey of the land. If it were intended that the metes and bounds description was to govern, this provision was not necessary. The acreage of an area, the measurements of whose four sides are shown in feet, can readily be computed accurately. On the other hand, the acreage within sections is sometimes subject to adjustment, as here, because of particular problems that exist or develop during survey.

Further indications that the lands were intended to be leased by sections rather than metes and bounds, shown in the advertisement and leases, are the provisions incorporating the existing and future regulations of the Secretary of the Interior. The regulation of May 31, 1938, 25 C.F.R. sec. 186.8 (now sec. 171.8), respecting the leasing of Indian tribal lands, provides that "The area covered by a lease * * * shall conform to the system of public-land surveys * * *." The reasonable assumption, therefore, must be that it was intended that this regulation would be followed. Appellant's contention that it could not apply to unsurveyed lands is without merit here where the lease terms specifically required

a survey in conformity with and tied to the system of public land surveys and where the tracts were described in terms of probable public land section numbers. Important here is the fact that, even though unsurveyed lands were leased, there could be no development until after survey.

We submit that on the basis of the foregoing terms and conditions of the advertisement for lease sale and of the leases, without more, the Secretary had ample support for his holding that the tracts were leased by sections when surveyed. However, as will next be shown, there is strong additional support for that result in the conduct of the parties in construing the leases before and after they were executed. This can be put in summary form, as follows:

1. Appellant and other oil companies requested and paid for an official Bureau of Land Management survey of the townships in the area to be leased. The survey was made with section corners marked on the perimeter of each township. This is strong indication that the sections were regarded as more important than the metes and bounds descriptions because the latter could have been run off from the courses and distances specified without regard to where the true sections would ultimately be established.

2. In compliance with the requirement that a lessee have his tract surveyed and a plat filed before applying to drill a well, appellant had a private survey made from the section corners established by B.L.M. This survey coincided, without conflict, with a survey made and platted by Phillips-Aztec along their common boundary and filed at about the same time. Relying on that plat and on the permission to drill given on that basis, appellant drilled a producing well. Phillips-Aztec also drilled on the basis of its plat. Appellant's plat by metes and bounds was not submitted until after these events and some eight months after the filing of its first plat. These circumstances give strong indication that for a long period, from the beginning of the leases and throughout the official survey, appellant believed and was content that its leases would be by section numbers when surveyed. At least, it seems to indicate (1) an understanding that the public land survey was requested for some other purpose than merely to give a closer tie-in point for a metes and bounds survey and (2) that it is perfectly rational to read the leases as meaning that the area conveyed was to be ascertained by reference to the section numbers of the official survey.

With all these considerations properly before him, we believe that the Secretary's determination was plainly right--certainly it was not clearly wrong--and should be affirmed. As the Supreme Court said in the mandamus suit of Udall v. Tallman, 380 U.S. 1, 4 (1965): "The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it. McLaren v. Fleischer, 256 U.S. 477, 481; Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414."

IV

THERE IS NOTHING ERRONEOUS IN THE CONTENTS OF THE ADMINISTRATIVE RECORD

Relying on decisions in cases where formal administrative hearings were conducted by regulatory agencies, appellant complains that it was error to include in the administrative record here briefs, interoffice communications and the transcript of the arguments by the parties to the Secretary of the Interior. But those cases, involving formal hearings with testimony and cross-examination of witnesses, receipt and rejection of evidence, etc., are not applicable to this situation which is an administering process.

This case originated with a request to the local Oil and Gas Supervisor to drill a well. No hearing was requested and, as is customary, none was had. The Supervisor corresponded with the Superintendent of the Indian Agency (who consulted with the Chairman of the Navajo Tribe) and the Area Director. Following receipt of information from them, permission to drill was denied. This is normal office administration. An appeal was then taken to the Commissioner of Indian Affairs. No hearing was requested and, as is customary, none was had. Briefs were filed. The Commissioner affirmed. An appeal was then taken to the Secretary. Again briefs with exhibits were filed, but no formal hearing (involving the introduction of evidence) was held. At this point, however, oral arguments were heard. The Secretary affirmed.

The case is a routine one in the procedure followed. Cf. United States v. Southwest Potash Corporation, 352 F.2d 113 (C.A. 10, 1965), cert. den., 383 U.S. 911. By the time it reached the Secretary, an administrative file had been built up containing all of the papers which had accumulated pertaining to the matter. The Secretary reviewed the file and made his decision on the basis of it and the oral arguments of the parties. That is the administrative record.

Since the Secretary is the administrator, by congressional designation, of the leasing of Indian tribal lands, he would be remiss in his administration (and placed in a ridiculous position) if he could not examine the complete Department file in a particular matter. And it is essential, of course, for intelligent review, that the reviewing court also have before it all the material which the Secretary considered in reaching his determination. This is not a situation where something was withheld from the district court. On the contrary, the whole record was there as it should have been and appellant was free to meet it with any argument available. Hence, appellant's objections are not well taken.

CONCLUSION

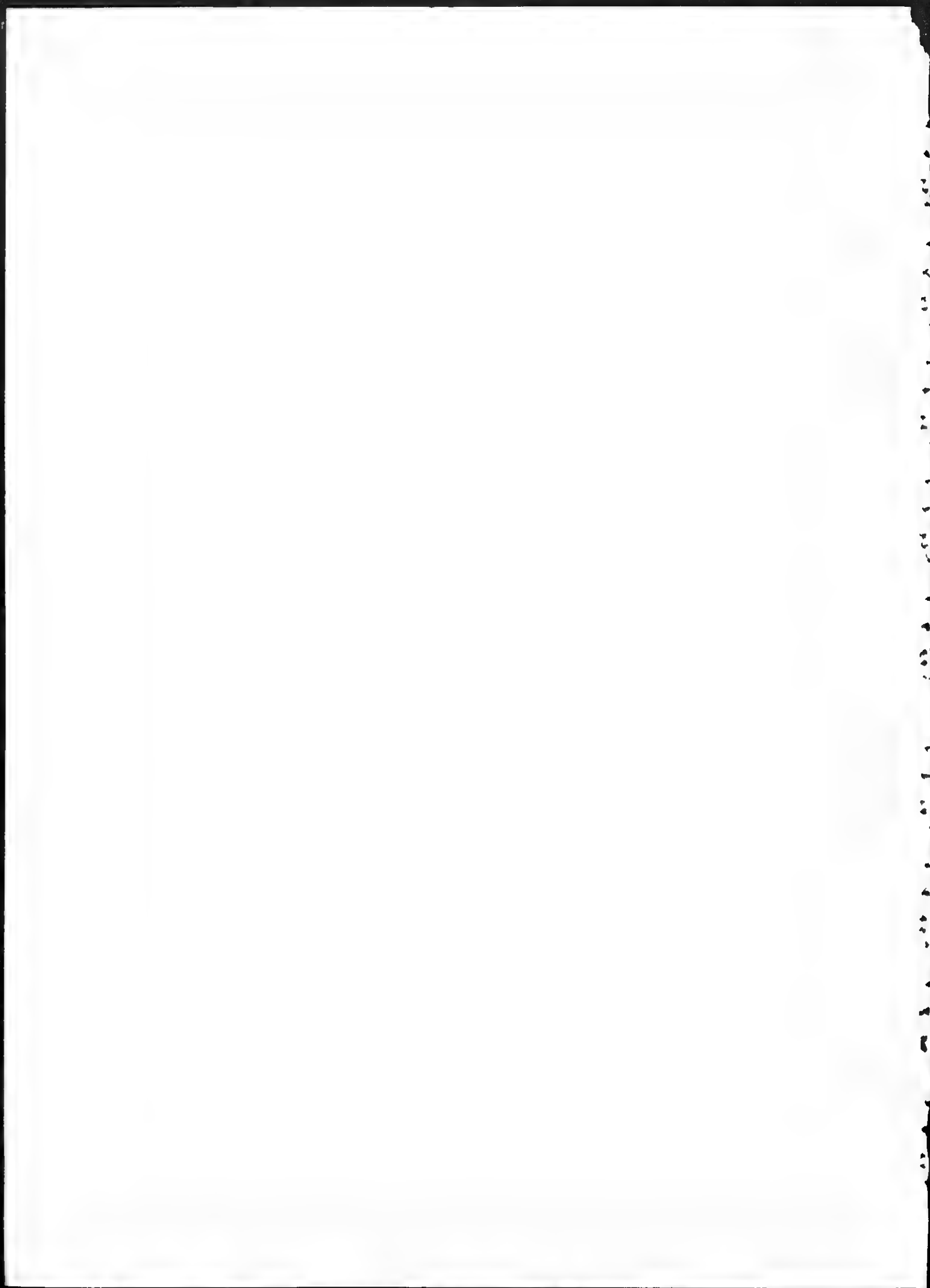
For the foregoing reasons, we submit that the judgment of the district court should be affirmed.

Respectfully submitted,

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OCTOBER 1966



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20, 362

CONTINENTAL OIL COMPANY,

Appellant,

v.

STEWART L. UDALL,

Secretary of the Interior

and

PHILLIPS PETROLEUM COMPANY

and

AZTEC OIL & GAS CO.,

Appellees,

PETITION FOR REHEARING

To The Honorable Judges of the United States Court
of Appeals for the District of Columbia:

Continental Oil Company, plaintiff-appellant above named, presents this, its petition for rehearing in the above entitled cause, and, in support thereof, respectfully states and shows:

I

No opinion was rendered in this controversy by either this Court or the District Court. Therefore, the Secretary's decision stands as the only judicial expression on the merits and issues involved (JA 38). That decision is incomprehensible insofar as the application of legal principles is concerned.

After recognizing that the description itself describes the lands by metes and bounds, the decision makes reference to various other provisions in the lease and in the regulations and finally concludes that "the contract has more elasticity than Continental appears to recognize." (JA 43).

Scattered through the opinion are various references to events and happenings that occurred after the lease sale. The Secretary's conclusion as to these events is apparently expressed in the following sentence: "Having once asserted a boundary line and acted in accordance therewith to its benefit, it is difficult to see how Continental can later claim a different boundary, particularly when it is in conflict with boundaries recognized as having been established by other lessees and acted upon by them." Even assuming that Continental's actions constituted an unreasonable delay in

asserting its position or a temporary misleading of others, the maximum penalty would be loss of its proportionate interest in the well drilled prior to assertion of its rights. There would be no legal basis for denying Continental its rightful proportionate interest in the other 15 wells involved.

The Secretary's decision does not set forth any recognizable rule of construction or principle of law applicable to this case, and the legal basis for his decision, if any, cannot be ascertained. The opinion would be useless in construing a lease in the same form acquired at another lease sale. The appellant respectfully submits that the judicial process must be found wanting if the Secretary's decision is to represent the law applicable to this case.

II

The appellees place great emphasis on a series of cases which hold that an administrative decision is not to be reversed unless it is "plainly wrong." This doctrine is applicable to an administrator's construction of his own regulations or the statute under which he operates because his administrative duties are involved. It does not apply after the administrative functions have been executed and the question is the meaning of a specific contract. That contract must be construed in accordance with applicable, established rules of law. Moreover there is no question here of the administrator's public trust being involved.

It is undisputed that the lands in question are under lease to either Continental or the intervenors and neither the United States nor the Navajo Tribe has any monetary or property interest in the subject matter of this controversy.

Appellant has documented and supported its position with pertinent and applicable authorities on virtually every point and issue raised in this controversy. Authorities cited by appellees are inapposite.

III

In the District Court appellant moved to have certain interoffice memoranda excluded from the administrative record submitted to the court for review and such motion was denied at the hearing. Appellant has cited authorities holding that due process is violated when an administrative decision is based on facts not made known to the parties with opportunity to refute. Appellant has also cited authorities holding that interoffice memoranda may not be included in the record for court review.

It is clear that among the interoffice memoranda the Secretary did consider a certain memorandum entitled Statement of Facts dated December 12, 1958, because some of the language therein appears verbatim in the opinion. (JA 42 and 104). This Statement of Facts and other memoranda contained in the administrative record were not made known to appellant until the record was submitted to the District Court. If the Secretary chose to consider unsubstan-


tiated facts and evidence not made known to the parties then, on appellate review, his decision must stand or fall without consideration of those facts and evidence. Only in this way are the due process rights of the parties protected.

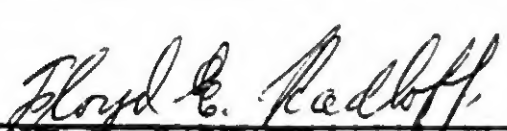
This Court's affirmance of the District Court necessarily includes approval of the lower court's ruling on appellant's motion to exclude these memoranda from the administrative record for review. Appellant respectfully submits that such ruling was contrary to law and in itself constituted reversible error.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgement of the District Court be, upon further consideration, reversed.

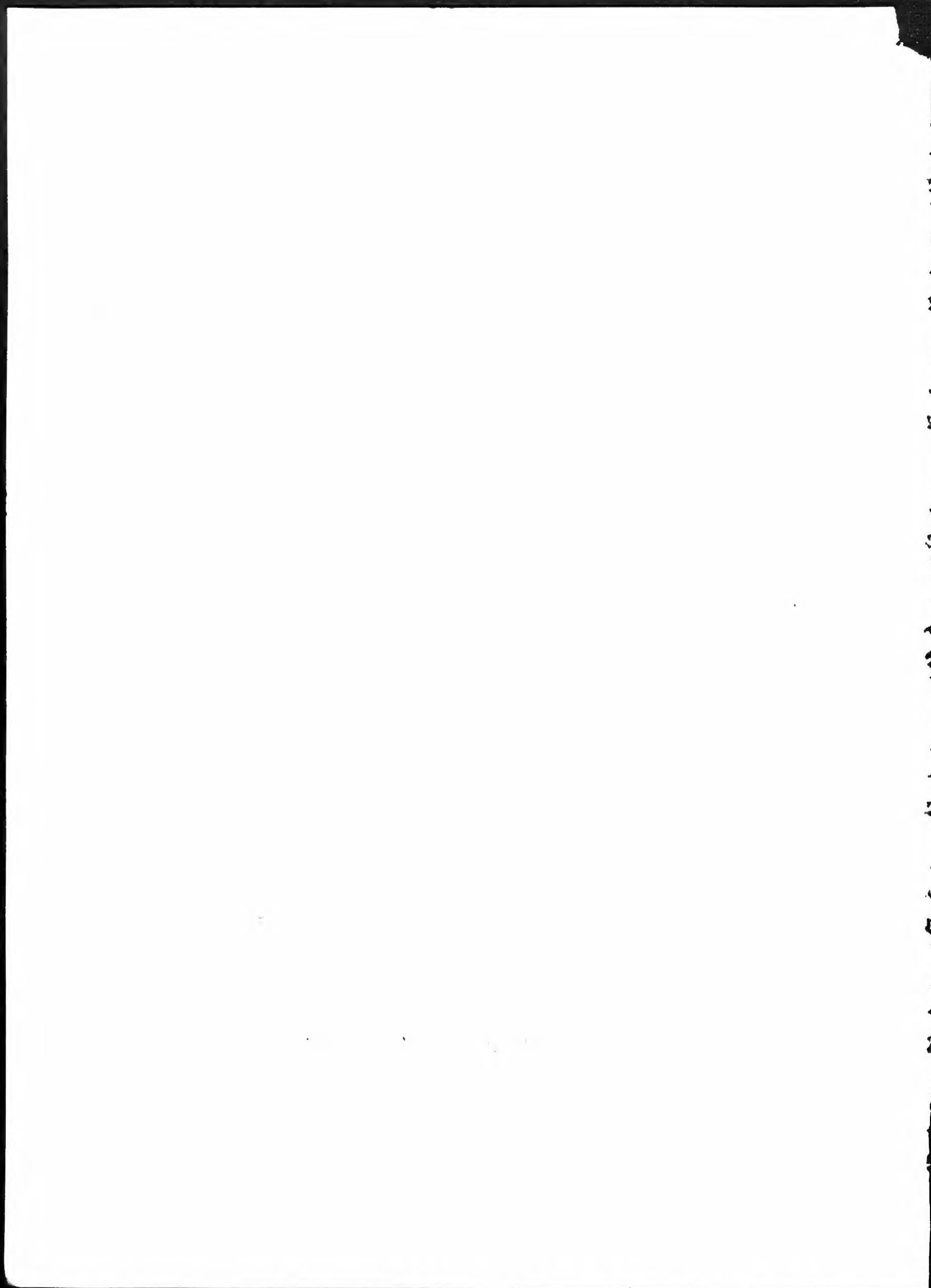
~~Copy~~ ~~Original~~ Signed Samuel W. McIntosh

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I, _____, Attorney for
appellant, do hereby certify that the foregoing petition
for rehearing of this cause is presented in good faith
and not for purpose of delay.

Copy ^{Original} Signed Samuel W. McIntosh

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